TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915

No. 311

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY,
PLAINTIFF IN ERROR,

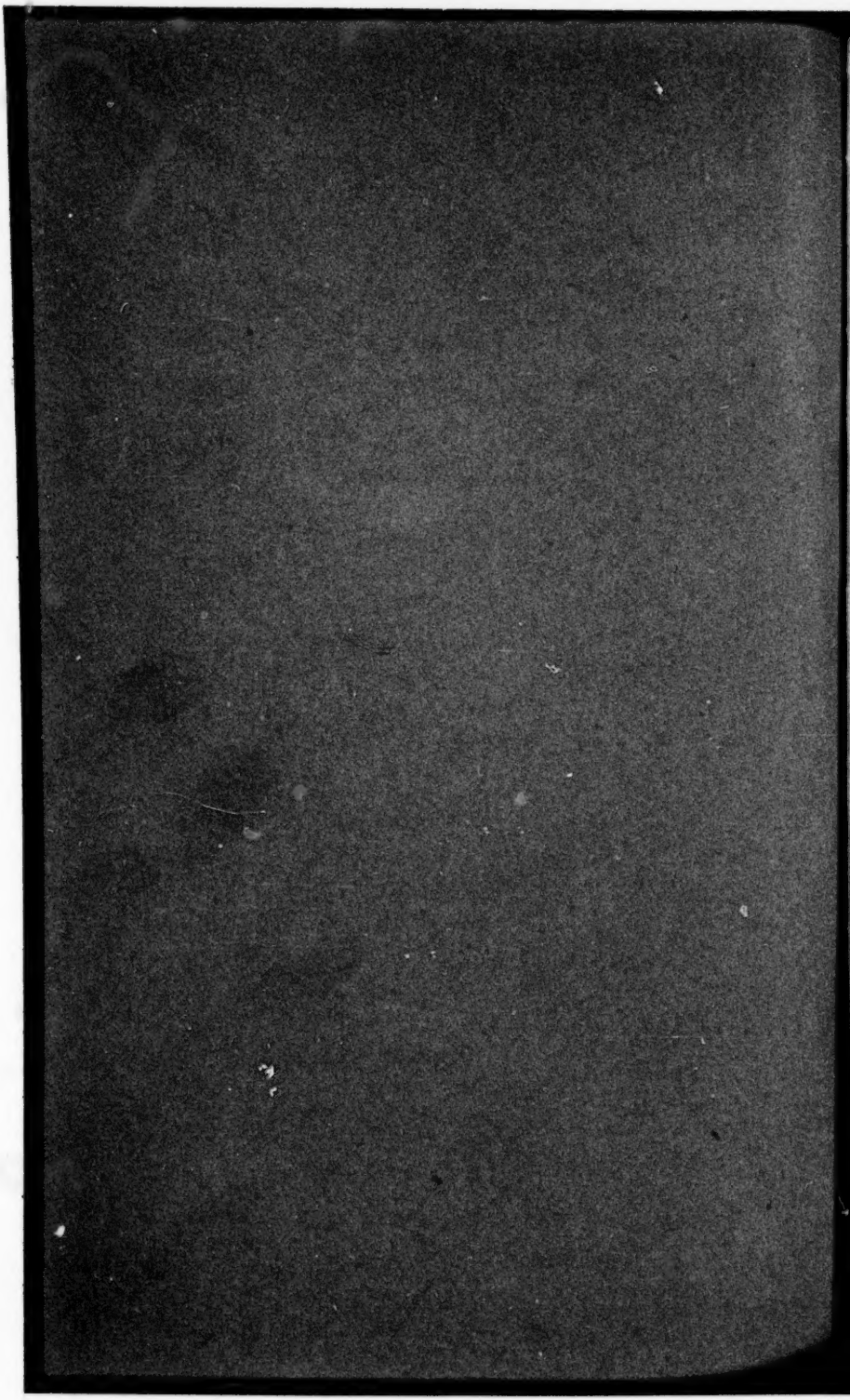
vs.

WILLIAM WAGNER.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED DECEMBER 26, 1914.

(24,436)



(24,486)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 742.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM WAGNER.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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Caption.

STATE OF TEXAS,
County of Bexar:

At a Regular Term of the District Court of the 57th. Judicial District, begun and holden within and for the County of Bexar and State of Texas, before the Hon. R. B. Minor, Judge thereof, presiding, and which opened on the 7th. day of April, A. D., 1913, and which adjourned on the 31st day of May, A. D., 1913, the following cause came on for trial, to-wit:

No. B-3488.

WM. WAGNER, Plaintiff,
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY, Defendant.

2 *Plaintiff's Second Amended Original Petition.*

Filed April 8, 1913.

Suit Pending in the 57th District Court, Bexar County, Texas.

No. B-3488.

WM. WAGNER
vs.
S. A. & A. P. RY. CO.

To the Hon. R. B. Minor, Judge of said Court:

The plaintiff, Wm. Wagner, with leave of Court, amends his first amended original petition filed heretofore, and by way of amendment says:

The petition of Wm. Wagner, who resides in Bexar County, complains of the San Antonio & Aransas Pass Railway Company, a railroad corporation, duly incorporated, having a local agent in Bexar County, and avers:

That heretofore, to-wit: on or about the 18th. day of October, 1911, plaintiff was in the employ of the defendant as a brakeman; and on said date the defendant was and it still is a common carrier by railroad, engaged in both interstate and intrastate commerce; and on said date, at the station of Kenedy on the line of the defendant railroad, the defendant then and there used on said railroad in interstate commerce and in intrastate commerce a certain engine and a certain car; and it became and was the duty of plaintiff then and there to couple the aforesaid engine and car together. Plaintiff avers that the couplers attached to said engine and car

would not couple automatically by impact, as required by law; and for the purpose of making said coupling it became necessary for plaintiff to stand upon the footboard of said engine, between said engine and car, and to shove the knuckle of the coupler on said engine so as to bring it into proper position to make the coupling as aforesaid. And plaintiff says that he placed his left foot against the knuckle of the coupler of the engine for the purpose of shoving said knuckle into position so as to make
3 said coupling as aforesaid, when in some manner he lost his balance and slipped and fell, and his left foot was caught between said couplers and was crushed and mangled, and he was thereby otherwise seriously, painfully and permanently injured, as hereinafter more specifically averred.

And plaintiff avers that the defendant was negligent in having and permitting the couplers on said engine and car to be so that they would not couple automatically by impact, as required by law; and that this negligence of the defendant was the direct cause of plaintiff's said injuries.

Plaintiff avers that by reason of his slipping, as aforesaid, his left foot was caught between the couplers of said engine and said car and was mashed and mangled to such an extent that a portion of the anterior part of his said left foot and four of his toes thereof were amputated, and this left said foot tender and sore, besides making it impossible to walk on said foot or to use the same in a natural manner; that, in addition thereto, he struck his back and head on some portion of said engine or other object, and he likewise wrenched his back and sides; that his spine was injured; that he sustained a profound shock to his entire nervous system, and his heart and his kidneys were likewise injured, and by reason of his injuries his eyes have been affected and his speech impaired, from all of which said injuries plaintiff avers that he has suffered and will continue to suffer, so long as his life lasts, great physical and mental pain.

Plaintiff avers that at the time he was injured he was twenty-nine years old, and prior thereto was a strong, healthy, robust young man, and earned and was capable of earning one hundred dollars a month, but that since his injuries, which he charges are permanent and incurable, he has not been able to labor or earn any money whatsoever, and that his ability to labor and earn money has been thereby greatly diminished and impaired; whereby, and by reason whereof, plaintiff avers that he has been damaged in the sum of $40,000.00.

Accordingly, plaintiff prays that on the trial hereof he
4 have judgment for his damages, as aforesaid, and for all costs of court. And plaintiff prays for general relief.

JOHN SEHORN,
Attorney for Plaintiff.

Filing: Filed Apr. 8, 1913. Andres Coy, Jr., District Clerk, Bexar County, Tex. By A. A. Rodriguez, Deputy.

Defendant's First Amended Original Answer.

Filed Apr. 30, 1913.

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WM. WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RY. CO.

Now comes the defendant, San Antonio & Aransas Pass Railway Company, and with leave of the Court files this its first amended original answer, amendatory and in lieu of its original answer herein filed, and for such answer says:

Defendant demurs and excepts to the sufficiency of plaintiff's second amended original petition, and says the same is wholly insufficient in law to entitled plaintiff to have and maintain his action in manner and form as charged.

For special exceptions to said petition defendant says:

(1) Specially excepting to said petition defendant says that the same is insufficient because it does not appear therefrom whether the defendant railway company was engaged in interstate or intrastate commerce at the time of plaintiff's alleged injuries, nor whether he was employed in interstate or intrastate commerce at the time of his alleged injuries, nor whether plaintiff seeks to charge the defendant with the breach of the State or Federal law with reference to coupling appliances.

(2) For special exception to said petition defendant says the same is insufficient to charge it with negligence, because it does not appear therefrom that defendant's said engine and cars were not equipped with couplers coupling automatically by impact in accordance with the requirement of the State law or in accordance with the requirement of the Federal law.

(3) Specially excepting to said petition defendant says the same is insufficient to charge this defendant with negligence and to put this defendant upon notice and proof, because the same does not set out or allege any defect in the couplers as constructed on said cars nor allege any defects in the maintenance of the couplers on said engine and cars which would charge this defendant with a violation of law, State or Federal, and only states the conclusion of the pleader that the couplers attached to said engine and cars would not couple automatically by impact as required by law.

Of all of which general and special exceptions, defendant asks judgment of the Court.

HOUSTON, BOYLE & STOREY,
Attorneys for Defendant San Antonio & Aransas Pass Railway Company.

Should the above and foregoing general and special exceptions be overruled, and this defendant be required to answer, then answering this defendant denies all and singular the allegations in plaintiff's petition contained, pleads not guilty, and demands strict proof.

Further answering, this defendant says that it is, and was
6 at the time of the accident complained of in plaintiff's petition, a common carrier engaged in interstate commerce and that the Congress of the United States, in the exercise of the exclusive power and authority vested in it to regulate interstate commerce, passed an Act, which was approved and became a law on March 2, 1893, entitled:

"An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes."

which said Act was amended by Act of Congress which became a law on March 2, 1903.

The said Act of Congress, in its amendment aforesaid, makes it unlawful for any common carrier engaged in interstate commerce to haul, or permit to be hauled or used on its line, any car used in moving interstate commerce not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, and by the amendment of March 2, 1903, as aforesaid, said provisions relating to automatic couplers are applied to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce.

That the engine and cars of this defendant with which plaintiff was working at the time of his injuries were equipped with automatic couplers, coupling automatically by impact, and which could be uncoupled without the necessity of men going between the ends of cars when the cars were in motion. That all couplers attached to railroad engines, tenders or cars must be provided with sufficient lateral motion to enable engines, cars and trains coupled together to round curves while being moved over railway tracks, and with adjustable knuckles which can be opened and closed, and
7 *and* such couplers must be adjusted at times so that they will couple automatically by impact, and that there is no character or kind of automatic coupler constructed, or that can be constructed, which will couple automatically at all times without previous adjustment, by reason of the lateral play necessary, as aforesaid, to enable coupled cars to round curves, and by reason of such adjustable knuckles necessary to couple and uncouple cars automatically by impact, and said couplers could and should have been adjusted by plaintiff only after bringing said engine and said cars to a standstill and going between the ends of the cars and there was no necessity for plaintiff to go between moving engine and cars or kicking said coupler over with his foot, while said engine was

in motion, or endangering his own personal safety in any way; and the Acts of Congress aforesaid do not require that said automatic couplers shall be of such construction that they will couple automatically by impact at all times without any adjustment of the couplers.

That the engine and cars which the plaintiff was employed upon at the time of his injury were engaged in interstate commerce, and were equipped with automatic couplers which would couple automatically by impact, as required by said Acts of Congress; but an adjustment was necessary to enable said couplers to couple automatically by impact, and could have been made by the plaintiff going between the car- while they were standing but without going between the ends of the cars, while in motion or between a moving engine and cars, or without kicking said coupling, or in any manner endangering his own personal safety.

That the work of adjusting said couplers to couple automatically by impact, could have been done by plaintiff or any other person with perfect safety to himself and without any danger or risk of injury by going between the engine and car while standing but

8 that the plaintiff negligently, recklessly and carelessly sought to adjust the couplers on said engine and cars while the engine was moving upon and close to the car to which it was sought to be coupled by kicking the coupler with his foot immediately before the engine and car came in contact, and that he slipped or fell or stumbled while standing on the foot-board of the engine with one foot and undertaking to kick the coupler apparatus with the other foot, negligently and recklessly and in utter disregard of his personal safety, and his foot caught between the coupling devices on the engine and car, and his injuries resulted therefrom and not from any negligence on the part of the defendant or any violation of law *and* its part.

Further answering, this defendant says that there was no defect in the coupling apparatus on its engine or cars at the time of plaintiff's injury; that the said engine and cars were equipped with automatic couplers coupling by impact; as required by the Acts of Congress aforesaid, and that while said coupling apparatus required adjustment before it would couple automatically by impact at the time of accident complained of, there was no necessity of plaintiff going between the engine and cars while in motion, or in any manner endangering his personal safety to make such adjustment, and, on the contrary, he was prohibited from so doing by the rules and regulations of this defendant, and that he negligently, recklessly, and carelessly in utter disregard of his personal safety and defendant's rules as aforesaid, stood upon the foot-board of defendant's engine and waited until said engine was about to come in contact with the car to which it was to be coupled, and then sought to kick said coupler into proper adjustment with his foot, and stumbled or fell while in the act of so doing, and caught his foot between the coupling apparatus of said engine and car, and his injuries resulted from such negligence and contributory negligence on his part, and not through any negligence on the part of this defendant.

Wherefore, defendant says it is not liable to plaintiff herein.

HOUSTON, BOYLE & STOREY,
Attorneys for Defendant, San Antonio & Aransas Pass Railway Company.

9 Filing: Filed April 30, 1913. Andres Coy, Jr., District Clerk, Bexar County, Tex. By A. A. Rodriguez, Deputy.

Plaintiff's First Supplemental Petition.

Filed April 30, 1913.

Suit Pending in the 57th District Court, Bexar County, Texas.

No. B-3488.

WM. WAGNER
vs.
S. A. & A. P. RY. CO.

Now comes the plaintiff, and with leave of Court files this his first supplemental petition, in answer to the defendant's first amended original answer, and excepting to all that part of said answer following the general denial, says, that the matters and things therein averred are wholly insufficient in law to constitute any defense to plaintiff's cause of action. And of this exception he prays the judgment of the court.

Answering said answer, plaintiff denies each and every allegation therein contained, and demands strict proof of same.

JOHN SEHORN,
Attorney for Plaintiff.

Filing: Filed Apr. 30, 1913. Andres Coy, Jr., District Clerk, Bexar County, Texas. By A. A. Rodriguez, Deputy.

10 *Order Sustaining Plaintiff's Demurrer.*

No. B-3488.

WM. WAGNER
vs.
S. A. & A. P. RY. CO.

April 30th, 1913.—This day came on to be heard plaintiff's demurrer to all that part of defendant's first amended original answer following the general denial, contained in Plaintiff's First Supplemental Petition, filed herein April 30th, 1913, and the Court having heard argument thereon is of the opinion that said demurrer should be sustained.

It is therefore ordered that plaintiff's demurrer contained in his first supplemental petition, to all that part of defendant's first amended original answer following the general denial be and the same is sustained by the Court and all of defendant's first amended original answer following the general denial be and the same is stricken out of said answer; to which action and ruling of the court defendant then and there in open Court excepted.

R. B. MINOR, *Dist. Judge.*

Entry: Ent. Vol. "9" p. 56.

Charge of the Court.

Filed May 2, 1913.

In District Court, 57th Judicial District, Bexar County.

No. B-3488.

WILLIAM WAGNER
vs.
11 SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

Charge of the Court.

In this cause the Court charges the jury as ollows:

I.

If you find from the evidence that at the time of the accident the defendant's locomotive and car to which it was attempted to couple the locomotive were not equipped with couplers coupling automatically by impact, without the necessity of plaintiff's going between the ends of the cars—; and if you further find from the evidence that by reason of such fact (if found by you) and as the proximate result thereof the plaintiff received any of the injuries complained of by *you*, you will find for the plaintiff.

II.

If you find from the evidence that said locomotive and car of defendant, at the time of the accident, were equipped with couplers coupling automatically by impact, without the necessity of plantiff's going between the ends of the cars, you will find for the defendant.

III.

If you find for the plaintiff and believe from the evidence that he sustained any of the injuries alleged in his petition, then you should allow him such sum as you believe from the evidence will fairly compensate him for the injuries received, if any, which are alleged in his petition and which you find from the testimony to

have been sustained, if any were sustained; and in estimating the damages you award the plaintiff, if any, you may take into consideration the mental and physical pain, if any, suffered by him consequent upon such injuries, if any, and the time, if any, he has lost in consequence of his injuries, if any; and if you believe from the evidence that such injuries, if any, are permanent and will
12 impair his capacity to labor and earn money in the future, then you may award him such sum as you believe from the evidence will fairly compensate him for such impaired capacity, if any, to labor and earn money in the future.

IV.

The burden of proof is upon the plaintiff to establish his case by a preponderance of the evidence. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony. The law you will receive from the Charge of the Court and be governed thereby.

R. B. MINOR,
District Judge.

Filing: Filed May 2, 1913. Andres Coy, Jr. District Clerk, Bexar County, Texas. By A. A. Rodriguez, Deputy.

Defendant's Special Charge No. 1.

57th Dist. Court.

No. B-3488.

WM. WAGNER
vs.
S. A. & A. P. RY. CO.

Defendant's Special Charge No. 1.

Defendant asks the Court to charge the jury as follows:
You are instructed to return a verdict for defendant.

HOUSTON, BOYLE & STOREY,
Att'ys for Def't.

13 Refused.
R. B. MINOR, *Dist. Judge.*

Filed May 2, 1913. Andres Coy, Jr., District Clerk, Bexar County, Tex. By A. A. Rodriguez, Deputy.

Special Charge No. 2 Asked by Defendant.

Filed May 2, 1913.

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WM. WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

Special Charge No. 2 Asked by Defendant.

Defendant asks the Court to charge the jury as follows:
GENTLEMEN OF THE JURY: If you find from the evidence that the coupling apparatus on the engine and tender of defendant was in such condition at the time of the accident that it would couple automatically by impact without the necessity of plaintiff adjusting same, then, you will find in favor of the defendant.

HOUSTON, BOYLE & STOREY,
Attorneys for Defendant, San Antonio & Aransas Pass Railway Company.

Refused.

R. B. MINOR, *Dist. Judge.*

14 Filing: Filed May 2, 1913. Andres Coy, Jr. District Clerk, Bexar County, Texas. By A. A. Rodriguez, Deputy.

Special Charge No. 3 Asked by Defendant.

Filed May 2, 1913.

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WM. WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

Special Charge No. 3 Asked by Defendant.

Defendant asks the Court to charge the jury as follows:
GENTLEMEN OF THE JURY: If you find from the evidence that the coupling apparatus on the engine and tender of defendant at the

time of the accident was in such condition that it would couple automatically by impact, then, you will find in favor of the defendant.

HOUSTON, BOYLE & STOREY,
Attorneys for Defendant, San Antonio and Aransas Pass Railway Company.

Refused.
R. B. MINOR, *Dist. Judge.*

15 Filing: Filed May 2, 1913. Andres Coy, Jr. District Clerk, Bexar County, Tex. By A. A. Rodriguez, Deputy.

Special Charge No. 4 Asked by Defendant.

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WILLIAM WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

Special Charge No. 4, Asked by Defendant.

Defendant asks the Court to charge the jury as follows:
GENTLEMEN OF THE JURY: If you find from the evidence that the coupling apparatus on the engine and tender of defendant was in such condition that it would couple automatically by impact without the necessity of the plaintiff kicking such coupler, or otherwise adjusting same, then, you will find in favor of the defendant.

HOUSTON, BOYLE & STOREY,
Attorneys for Defendant, San Antonio and Aransas Pass Railway Company.

Refused.
R. B. MINOR, *Dist. Judge.*

Filed May 2, 1913. Andres Coy, Jr., District Clerk, Bexar County, Tex. By A. A. Rodriguez, Deputy.

16 *Special Charge No. 5, Asked by Defendant.*

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WILLIAM WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

Special Charge No. 5, Asked by Defendant.

Defendant asks the Court to charge the jury as follows:
GENTLEMEN OF THE JURY: If you find from the evidence that the

coupling apparatus on the engine and tender of defendant was in such condition at the time of the accident that it could be made to couple automatically by impact without the necessity of plaintiff kicking said coupler, or otherwise adjusting same, while said engine was moving, then, you will find in favor of defendant.

HOUSTON, BOYLE & STOREY,
Attorneys for Defendant San Antonio and Aransas Pass Railway Company.

R. B. MINOR, *Dist. Judge.*

Filed May 2, 1913. Andres Coy, Jr., District Clerk, Bexar County, Tex. By A. A. Rodriguez, Deputy.

Special Charge No. 6, Asked by Defendant.

In District Court, 57th Judicial Dist., Bexar County, Texas.

No. B-3488.

WILLIAM WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

17 Special Charge No. 6, Asked by Defendant.

Defendant asks the Court to charge the jury as follows:

GENTLEMEN OF THE JURY: If you find from the evidence that the plaintiff placed his left foot against the knuckle of the coupler on the engine for the purpose of shoving said knuckle in position so as to make said coupler couple automatically by impact, then, you will find in favor of defendant.

HOUSTON, BOYLE & STOREY,
Attorneys for Defendant San Antonio and Aransas Pass Railway Company.

Refused.
R. B. MINOR, *Dist. Judge.*

Filed May 2, 1913. Andres Coy, Jr., District Clerk, Bexar County, Tex. By A. A. Rodriguez, Deputy.

Special Charge No. 7, Asked by Defendant.

Filed May 2, 1913.

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WILLIAM WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

Special Charge No. 7, Asked by Defendant.

Defendant asks the Court to charge the jury as follows:
18 GENTLEMEN OF THE JURY: If you find from the evidence that the coupling apparatus on the engine and tender of defendant was out of adjustment at the time of the accident so that it would not couple automatically by impact by reason of any acts of the plaintiff, then, you will find in favor of the defendant.

HOUSTON, BOYLE & STOREY,
Attorneys for Defendant San Antonio and Aransas Pass Railway Company.

Refused.
R. B. MINOR, *Dist. Judge.*

Filed May 2, 1913. Andres Coy, Jr., District Clerk, Bexar County, Texas. By A. A. Rodriguez, Deputy.

Special Charge No. 8, Asked by Defendant.

Filed May 2, 1913.

In District Court 57th Judicial District, Bexar County, Texas.

No. B-3488.

WILLIAM WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

Special Charge No. 8, Asked by Defendant.

Defendant asks the Court to charge the jury as follows:
GENTLEMEN OF THE JURY: If you find from the evidence that the coupling apparatus on defendant's engine and tender was
19 in such condition that it would couple automatically by impact when the first attempt to couple defendant's engine and car was made, and you find that the drawbar of said coupling ap-

paratus was out of adjustment when the second coupling was attempted, and that such condition resulted from the acts of the plaintiff, then, you will find in favor of the defendant.

HOUSTON, BOYLE & STOREY,
Attorneys for Defendant San Antonio and Aransas Pass Railway Company.

Refused.
R. B. MINOR, *Dist. Judge.*

Filed May 2, 1913. Andres Coy, Jr., District Clerk, Bexar County, Texas. By A. A. Rodriguez, Deputy.

Special Charge No. 9, Asked by Defendant.

Filed May 2, 1913.

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WILLIAM WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

Special Charge No. 9, Asked by Defendant.

Defendant asks the Court to charge the jury as follows:

GENTLEMEN OF THE JURY: If you believe from the evidence that plaintiff stood upon the footboard of defendant's engine with one foot, and attempted to shove the coupling apparatus of said engine with the other foot, and that he slipped by reason of the condition of said footboard and was thereby injured, then you will find in favor of the defendant.

HOUSTON, BOYLE & STOREY,
Attorneys for Defendant San Antonio and Aransas Pass Railway Company.

Refused.
R. B. MINOR, *Dist. Judge.*

Filed May 2, 1913. Andres Coy, District Clerk, Bexar County, Texas. By A. A. Rodriguez, Deputy.

Special Charge No. 10, Asked by Defendant.

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WILLIAM WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

Special Charge No. 10, Asked by Defendant.

Defendant asks the Court to charge the jury as follows:

GENTLEMEN OF THE JURY: If you believe from the evidence that plaintiff's injuries were caused by his standing on footboard of defendant's engine, and slipping on said footboard, and not from his attempt to shove defendant's coupling apparatus so that it would couple automatically by impact, then, you will find in favor of defendant.

HOUSTON, BOYLE & STOREY,
Attorneys for Defendant San Antonio and Aransas Pass Railway Company.

21 Refused.
R. B. MINOR, *Dist. Judge.*

Filed May 2, 1913. Andres Coy, District Clerk, Bexar County, Texas. By A. A. Rodriguez, Deputy.

Verdict of the Jury.

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WILLIAM WAGNER
vs.
S. A. & A. P. RY. CO.

We the jury find the verdict for the plaintiff in the sum of Fifteen Thousand Dollars $15,000.00.

RUD NAGEL, *Foreman.*

Filed May 2, 1913. Andres Coy, District Clerk, Bexar County, Texas. By A. A. Rodriguez, Deputy.

Judgment.

Ent. Vol. 9, pp. 27 & 28.

Suit Pending in the 57th District Court, Bexar County, Texas.

No. B-3488.

WILLIAM WAGNER
vs.
S. A. & A. P. RY. CO.

22 On the 30th day of April, coming on to be heard the above numbered and entitled cause, came the parties plaintiff and defendant, and both parties announced ready for trial. And thereupon came a jury of good and lawful men, to-wit: Rudolph Nagel, Foreman, and eleven others, who, being duly elected, impaneled and sworn, and who, after having heard the pleadings, evidence, argument of counsel and charge of the court, retired to consider their verdict; and thereafter, on the second day of May, 1913, returned into open court the following verdict:

"We, the jury, find the verdict for the plaintiff in the sum of fifteen thousand dollars ($15,000.00).

RUD. NAGEL, *Foreman.*

Which verdict was received and approved by the Court.

It is accordingly considered, ordered, adjudged and decreed by the court, in accordance with the verdict of the jury, that the plaintiff William Wagner do have and recover of and from the defendant, San Antonio & Aransas Pass Railway Company, the aforesaid sum of $15,000.00, to bear interest from the date hereof, until paid, at the rate of six per cent per annum, together with all costs in this behalf expended, for which execution may issue.

Entry: Ent. Vol. "9", pp. 27 & 28.

23 *Defendant's First Amended Motion for New Trial.*

Filed May 28, 1913.

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WILLIAM WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

Now comes the defendant, San Antonio & Aransas Pass Railway Company, and, with leave of the Court files this, its First Amended

Motion for New Trial herein filed, and asks the Court to set aside the verdict and judgment herein rendered, and grant a new trial, for the following reasons, to-wit:

First. Because the Court erred in sustaining the general demurrer of plaintiff contained in his First Supplemental Petition to all that part of defendant's First Amended Original Answer other than the general denial, and striking out of said Answer all of the defenses therein set up except the general denial, as shown by the Court's order sustaining said demurrer, and as shown by defendant's Bill of Exception Number One, because the allegations in said answer other than the general denial set up and allege proper defenses to plaintiff's cause of action, and defendant should have been permitted to sustain such defenses by proof.

Second. Because the Court erred in sustaining the general demurrer of plaintiff contained in his First Supplemental Petition to all that part of defendant's First Amended Original Answer other than the general denial, and striking out of said Answer all of the defenses therein set up except the general denial, as shown by the Court's order sustaining said demurrer, and as shown by defendant's Bill of Exception Number One, because defendant was entitled to plead and prove, as a proper matter of defense to plaintiff's
24 cause of action, that all couplers attached to railroad engines, tenders or cars must be provided with sufficient lateral motion to enable engines, cars and trains coupled together to round curves while being moved over railroad tracks, and with adjustable knuckles which can be opened and closed, and that such couplers must be adjusted at times so that they will couple automatically by impact, and that there is no character or kind of automatic coupler constructed, or that can be constructed, which will couple automatically by impact at all times without previous adjustment by reason of the lateral play necessary, as aforesaid, to enable coupled cars to round curves, and by reason of such adjustable knuckles necessary to couple and uncouple cars automatically by impact, and that defendant's engines and cars with which plaintiff was employed at the time of his injury were equipped with such automatic couplers which would couple automatically by impact, as required by the Act of Congress.

Third. Because the Court erred in sustaining the general demurer of plaintiff contained in his First Supplemental Petition to all that part of defendant's First Amended Original Answer other than the general denial, and striking out of said Answer all of the defenses therein set up except the general denial, as shown by the Court's order sustaining said demurrer, and as shown by defendant's Bill of Exception Number One, because defendant was entitled to prove that all couplers attached to railroad engines, tenders or cars must be provided with sufficient lateral motion to enable engines, cars and trains coupled together to round curves while being moved over railroad tracks, and with adjustable knuckles which can be opened and closed, and that all such couplers must be adjusted at times so that they will couple automatically by impact, and that defendant's engines and cars with which plaintiff was working were equipped with such automatic couplers, as required by the Acts of

Congress, notwithstanding an adjustment was necessary to enable said couplers to couple automatically by impact, and could have been made by the plaintiff going between the cars while they were standing and without going between the ends of cars while
25 in motion or between a moving engine and car, or without kicking said coupling, or in any manner endangering his own personal safety, because such pleading and proof would establish the defense that the coupling apparatus on said car met the requirements of law, and that plaintiff's injuries resulted from his own negligence and contributory negligence.

Fourth. Because the Court erred in sustaining the general demurrer of plaintiff contained in his First Supplemental Petition to all that part of defendant's First Amended Original Answer other than the general denial, and striking out of said Answer all of the defenses therein set up except the general denial, as shown by the Court's order sustaining said demurrer, and as shown by defendant's Bill of Exception Number One, because defendant was entitled to prove that the automatic couplers on defendant's engine and cars with which plaintiff was working were required to have lateral play to enable them to round curves and adjustable knuckles which could be opened and closed, and that it was necessary to adjust said couplers before they would couple automatically by impact, and that there was no necessity for plaintiff going between the engine and cars while in motion, or in any manner endangering his personal safety, to make such adjustment, and, on the contrary, he was prohibited from so doing by the rules and regulations of this defendant, and that he negligently, recklessly, and carelessly, in utter disregard of his own personal safety and defendant's rules, as aforesaid, stood upon the footboard of defendant's engine, and waited until said engine was about to come in contact with the car with which it was to be coupled, and then sought to kick said couplers into proper adjustment with his foot, and slipped, stumbled, or fell while in the act of so doing, and caught his foot between the coupling apparatus of said engine and car, because such pleading and proof would establish the defense that the coupling apparatus with which plaintiff was working met the requirements of the law,
26 and that his injuries resulted from his own negligence and contributory negligence.

Fifth. Because the court erred in sustaining plaintiff's demurrer as contained in his First Supplemental Petition to the matters of defense set up in defendant's First Amended Original Answer, because the defendant was entitled to prove, as alleged, that it was necessary in the construction of automatic couplers to provide lateral play so that cars and engines could round curves, and provide adjustable knuckles which could be opened and closed, and that by reason of such lateral play and such adjustable knuckles, it was necessary to adjust coupling devices so that they would couple automatically by impact, and that defendant's engine and car at the time of plaintiff's injuries were equipped with such automatic couplers which would couple automatically by impact after a proper adjustment, made necessary on account of the lateral play and ad-

justable knuckles necessary, as aforesaid, and the holding of the Court that such pleading and proof would not show a compliance with the Safety Appliance Act of Congress, or constitute a defense to plaintiff's cause of action, so construes the Safety Appliance Act of Congress, as aforesaid, as to impose upon railway companies, and this defendant, a duty impossible of performance, and to thereby constitute the taking of defendant's property without due process of law, and to deny to this defendant the equal protection of the law, in violation of Article V, Section 1 of the Fourteenth Amendment to the Constitution of the United States, and said Safety Appliance Act of Congress, as aforesaid, is therefore unconstitutional and void.

Sixth. Because the Court erred in permitting plaintiff, William Wagner, to testify over defendant's objection, as shown by defendant's Bill of Exception Number Two, that it was necessary for him, in the proper operation of coupling the engine and car together to shove the coupling over as he attempted to do, because such testimony called for and stated a conclusion of the witness on a material issue in the case.

27 Seventh. Because the Court erred in excluding the testimony of J. T. Smith, Official Court Reporter of the 45th. District Court of Bexar County, Texas, as to the testimony of Doctors Braunagel, McIntosh and Barnitz, the Board of Physicians appointed by the Court, who testified in the case of McDavitt vs. San Antonio and Aransas Pass Railway Company, which testimony was offered by the defendant on the question of the competency of Doctor Taylor, who testified in this case, as shown by defendant's Bill of Exception Number Three, and a proper predicate was laid for such testimony in the cross examination by defendant's counsel of plaintiff's witness, Doctor Taylor, as to his competency as a physician and surgeon, and such testimony was properly admissable on that issue.

Eighth. Because the court erred in overruling defendant's objection to the improper remarks of plaintiff's counsel in his closing argument to the jury, as shown by defendant's Bill of Exception Number Four, because such argument was highly improper and prejudicial to the rights of this defendant in this cause.

Ninth. Because the Court erred in the first paragraph of its charge to the jury in submitting the issue as to whether or not "at the time of the accident the defendant's locomotive and car to which it was attempted to couple the locomotive were not equipped with couplers coupling automatically by impact, without the necessity of plaintiff's going between the ends of the cars," because the undisputed evidence in this case shows that the coupling apparatus on the car had been adjusted prior to the time of the accident, and was at the time of the accident equipped with couplers coupling automatically by impact, and neither the pleadings or evidence in the case raise the issue so submitted by the Court's Charge as to whether or not the car was equipped with couplers coupling automatically by impact, and the submission of such issue was calculated to and did prejudice the rights of this defendant.

Tenth. Because the court erred in the second paragraph of its charge to the jury in submitting the issue as to whether or not the locomotive and car of defendant at the time of the accident were
28 equipped with couplers "coupling automatically by impact" because the undisputed evidence in the case shows that the car of defendant, at the time of the accident, was equipped with couplers coupling automatically by impact, and the submission of the issue as to whether or not said car was equipped with couplers coupling automatically by impact was not authorized by the pleadings or proof in the case, and was prejudicial to the rights of this defendant.

Eleventh. Because the Court erred in the first paragraph of its charge to the jury in directing the jury to find for the plaintiff if they found from the evidence that at the time of the accident defendant's locomotive and car to which it was attempted to couple the locomotive were not equipped with couplers coupling automatically by impact without the necessity of plaintiff's going between the ends of the cars, because such issue was contrary to the issue made by the pleadings in the case, plaintiff's petition averring that the couplers would not couple automatically, because it became necessary for the plaintiff to shove the knuckle of the coupler on the engine into proper position to make the coupling, and the Court should have confined the jury to the issue as to whether or not the coupling device on said engine was in such condition that it became necessary for plaintiff to shove the knuckle of the coupler on said engine so as to bring it into proper position to make the coupling.

Twelfth. Because the Court erred in the second paragraph of its charge to the jury in authorizing a verdict for the defendant only in the event that the jury found that the locomotive and car of defendant, at the time of the accident, were equipped with couplers coupling automatically by impact, without the necessity of plaintiff going between the ends of the cars, because the plaintiff's cause of action is predicated entirely on the issue as to whether or not it was necessary for plaintiff to shove the knuckle on the coupling device of the locomotive into position so that it would couple automatically by impact, and defendant was entitled to have the jury instructed to find in its favor if they found that it was not
29 necessary for plaintiff to shove the knuckle on the coupling apparatus of the engine into position so that the engine and car would couple automatically by impact.

Thirteenth. Because the verdict of the jury is contrary to and unsupported by the pleadings and evidence in this, that the cause of action alleged is predicated on the proposition that it became necessary for plaintiff to shove the knuckle of the coupling apparatus of the engine into proper position so that it would couple automatically by impact, and there is no evidence in this case showing that it became or was necessary for plaintiff to shove or in any manner adjust the knuckle on the coupling apparatus of the engine, and there is, therefore, a fatal variance between the pleadings and proof in the case.

Fourteenth. Because the verdict of the jury is contrary to and unsupported by the evidence in this, that the evidence in this case does not show that the coupling apparatus on defendant's engine, which it is alleged caused plaintiff's injury, was not an automatic coupler as required by the Acts of Congress, but, on the contrary, the evidence in this case does show that said coupling apparatus was a coupling aparatus in conformity with the requirements of the Acts of Congress in that said coupling apparatus would and did couple automatically by impact when properly adjusted.

Fifteenth. Because the verdict of the jury is excessive in this, that the evidence in this case shows that plaintiff's injuries were of such a character as to only partially disable him from laboring and earning money, and only to the extent that the loss of his toes on his left foot would impair the use of his foot, and did not show such pain and suffering and impairment of his ability to labor and earn money as to authorize a verdict for the amount rendered herein.

Sixteenth. Because the Court erred in refusing to give Special charge No. 2 asked by the defendant, because defendant was entitled to have the jury instructed to return a verdict in defendant's
30 favor, if they found from the evidence that the coupling apparatus on the engine and tender of defendant was in such condition at the time of the accident that it would couple automatically without the necessity of plaintiff adjusting same, because the only issue raised by the pleadings or evidence in the case was as to the condition of the coupling apparatus on the engine and tender at the time of the accident.

Seventeenth. Because the Court erred in refusing to give defendant's Special Charge No. 3, because, under the pleadings and evidence in the case, defendant was entitled to have the jury instructed to return a verdict in its favor, if they found that the coupling apparatus on the engine and tender of defendant at the time of the accident was in such condition that it would couple automatically by impact.

Eighteenth. Because the Court erred in refusing defendant's Special Charge No. 4 because defendant was entitled to have the jury charged, under the pleadings and evidence in this case, to return a verdict in its favor if they found from the evidence that the coupling apparatus on the engine and tender of defendant was in such condition that it would couple automatically by impact without the necessity of the plaintiff kicking such coupler, or otherwise adjusting same.

Nineteenth. Because the Court erred in refusing defendant's Special Charge No. 5, because the defendant was entitled to have the jury charged, under the pleadings and the evidence in this case, to return a verdict in its favor, if they found from the evidence that the coupling apparatus on the engine and tender of defendant was in such condition at the time of the accident that it could be made to couple automatically by impact without the necessity of plaintiff kicking said coupler, or otherwise adjusting same, while said engine was moving.

Twentieth. Because the Court erred in refusing to give defendant's Special Charge No. 6, because defendant was entitled to have
31 the jury to return a verdict in its favor, if they found from the evidence that plaintiff placed his left foot against the knuckle of the coupler on the engine for the purpose of shoving said knuckle in position so as to make said coupler couple automatically by impact, because such was the cause of action made by the plaintiff's pleadings in the case, and there was no evidence offered to sustain same.

Twenty-first. Because the Court erred in refusing to give defendant's Special Charge No. 7, because defendant was entitled to have the jury instructed to return a verdict in defendant's favor, if they found from the evidence that the coupling apparatus on the engine and tender of defendant was out of adjustment at the time of the accident so that it would not couple automatically by impact by reason of any acts of the plaintiff, because the evidence in this case raised the issue as to whether or not the plaintiff, by his own acts, had not gotten said coupling apparatus on said engine and tender out of adjustment.

Twenty-second. Because the court erred in refusing defendant's Special Charge No. 8, because defendant was entitled to have the jury instructed to find in defendant's favor, if they found from the evidence that the coupling apparatus of defendant's engine and tender was out of adjustment when the second coupling was attempted by reason of any acts of the plaintiff, because the evidence in this case raised such issue.

Twenty-third. Because the Court erred in refusing to give defendant's Special Charge No. 10, because defendant was entitled under the pleadings and evidence in this case, to have the jury instructed to find in its favor, if they found that plaintiff's injury was caused by his standing on the footboard of defendant's engine, and slipping on said footboard, and not from his attempt to shove defendant's coupling apparatus so that it would couple automatically by impact.

32 Twenty-fourth. Because the verdict of the jury was arrived as or influenced by improper argument used by one or more of the members of said jury in this, that the argument was made by one or more of the members of the jury that plaintiff should have a verdict for Twenty Thousand Dollars ($20,000.00) because he would be required to give probably one-half thereof to his attorneys, and that very likely said plaintiff had been advanced as much as One Thousand or Eleven Hundred Dollars by said attorneys during the period between the time said attorneys were employed by him to the trial of the case. That defendant believes and chargs the fact to be, that such improper argument influenced the verdict of the jury in favor of plaintiff for the amount rendered herein, and that it is contrary to law that such argument should be used in the deliberations of a jury, or in any manner considered by any member of the jury, in arriving at their verdict and this defendant attaches hereto to sustain this contention, the affidavit of W. E. Love, one of the twelve jurors who sat in the trial of this case and returned

the verdict herein for Fifteen Thousand Dollars ($15,000.00), and asked that the members of the jury who tried this case be summoned to appear and give testimony on a hearing of this motion for new trial as to the improper argument which defendant avers was made during their deliberations, and which influenced their verdict in this case.

Wherefore, defendant asks that the verdict and judgment herein rendered be set aside, and a new trial be granted herein.

HOUSTON, BOYLE & STOREY,
Attorneys for Defendant, San Antonio and Aransas Pass Railway Company.

STATE OF TEXAS,
County of Bexar:

Before me, the undersigned authority, on this day per-
33 sonally appeared W. E. Love, who deposes and says:

That he was one of the 12 jurors that sat in the trial of the case of Wagner versus San Antonio and Aransas Pass Railway Company, which was tried in the Fifty-seventh District Court of Bexar County, Texas, during the week beginning April 28th, 1913, and in which a verdict of Fifteen Thousand Dollars for plaintiff and against said defendant was rendered.

Affiant further deposes and states that while the members of the jury were considering their verdict, some member of said jury who was contending that a verdict of Twenty Thousand Dollars should be rendered for plaintiff, used as an argument for the position he took, that plaintiff should have a verdict for that sum because he would be required to give probably one-half thereof to his attorneys, and that very likely said plaintiff had been advanced as much as One Thousand or Eleven Hundred Dollars by said attorneys during the period between the time said attorneys were employed by him and the trial of the case; and that said juror, whose name is to the affiant unknown further argued that when these amounts had been paid the plaintiff would have only a sum between Eight and Ten Thousand Dollars, and, therefore, argued and insisted that they render a verdict for Twenty Thousand Dollars, or some sum in that neighborhood. Affiant further makes oath and testifies that he, himself, and some other members of the said jury were of the opinion that a verdict of from Eight Thousand to Ten or Eleven Thousand Dollars was ample in this case.

Affiant further states that he cannot say to what extent the other low men were influenced by the above mentioned argument which was talked about a great deal in the jury room.

Affiant further makes oath and states that this argument appeared to have great weight with the person who wanted to give the Twenty Thousand Dollars, and, unquestionably was the
34 cause of said person desiring to bring in a large verdict for the plaintiff in this case.

Affiant further says that upon a ballot being taken in the jury room as to whether or not a verdict for Ten Thousand Dollars should be rendered for the plaintiff, seven of the jurors voted for

a Ten Thousand Dollar verdict, while five jurors would not agree to as low a verdict, and among the five was the person who used the above-mentioned argument as to the reason why he was desirous of giving Twenty Thousand Dollars.

W. E. LOVE.

STATE OF TEXAS,
Co. of Bexar:

Known to me as W. E. Love who ascribed his name and swore to above, this 6th day of May 1913.

HENRY W. BALL,
Justice of the Peace of Pre. #7,
Elmendorf, Bexar Co., Tex.

Filing: Filed May 28, 1913. Andres Coy, Jr., District Clerk, Bexar County, Texas. By Geo. W. Huntress, Jr., Deputy.

Defendant's Application for Extension of Time to File Statement of Facts, etc.

No. B-3488.

WM. WAGNER
vs.
S. A. & A. P. RY. Co.

35 Now comes the defendant herein and asks the Court to extend the time for preparing and filing statement of facts and bills of exception herein so that defendant may have sixty days after adjournment to prepare and file said bills of exception and statement of facts and for cause why said time should be so extended defendant represents and shows to the Court that the official shorthand reporter of this Court cannot prepare and file his transcript of the testimony and other proceedings recorded in this case in question and answer form in less than thirty days after adjournment hereof and defendant requires such transcript to prepare statement of facts and bills of exception herein.

HOUSTON, BOYLE & STOREY,
Att'ys for Def't.

Filed May 31, 1913. Andres Coy, Jr., District Clerk, Bexar County, Tex. By A. A. Rodriguez, Deputy.

Order Overruling Defendant's Amended Motion for New Trial.

No. B-3488.

WM. WAGNER
vs.
S. A. & A. P. RY. CO.

SATURDAY, May 31st, 1913.

On the 29th day of May, 1913, came on to be heard defendant's amended motion for new trial and the Court having heard said motion and the evidence offered as to the alleged misconduct of the jury set up in said motion, and the argument of counsel thereon and considered same on this 31st day of May, 1913, ruled that said motion should be overruled.

36 It is therefore ordered, adjudged and decreed that defendant's amended motion for new trial be and the same is overruled; to which action and ruling of the Court defendant then and there in open Court excepted and in open Court gave notice of appeal to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

Defendant having requested that the official shorthand reporter transcribe the testimony and other proceedings recorded by him in this case, in question and answer form, it is ordered that the official shorthand reporter of this Court shall transcribe the testimony and other proceedings recorded by him in this case, certifying that such transcript is true and correct and shall file the same within the office of the Clerk of this Court within thirty days from and after the adjournment of this Court.

And thereupon came on to be heard defendant's application to be allowed sixty days after adjournment of court in which to prepare and file statement of facts and bills of exception herein and the same was granted by the Court for good cause shown.

It is therefore ordered that defendant be and it is allowed sixty days after adjournment of Court to prepare and file statement of facts and bills of exception herein.

Approved,

DW. B. MINOR, *Dist. Judge.*

Entry: Ent. Vol. "9", p. 56.

Defendant's Bill of Exception No. I.

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WM. WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY CO.

37 Defendant's Bill of Exception No. I.

Be it remembered that on April 30, 1913, this cause coming on to be heard, plaintiff files his First Supplemental Petition presenting a general demurrer to all that part of defendant's First Amended Original Answer other than the general denial, and the Court having heard said general demurrer and argument thereon over defendant's objection sustained the same and struck out of defendant's First Amended Original Answer all of said answer except the general denial.

To which action and ruling of the Court defendant then and there excepted, and tenders this, its Bill of Exception, and asks that same be signed, filed and made a part of the record herein, which is accordingly done.

R. B. MINOR, *Dist. Judge.*

Filing: Filed Jul. 30, 1913. Andres Coy, Jr., District Clerk, Bexar County, Texas. By A. A. Rodriguez, Deputy.

Defendant's Bill of Exception No. 2.

Filed Jul- 30, 1913.

In District Court, 57th Judicial District, Bexar County, Texas.

WM. WAGNER
vs.
SAN ANTONIO AND ARANSAS PASS RAILWAY CO.

Defendant's Bill of Exception No. 2.

38 Be it remembered on the trial of the above entitled and numbered cause, while the plaintiff, Wm. Wagner, was testifying on direct examination, the following proceedings were had:

By Mr. SEHORN:

Q. How long had you been a brakeman altogether?
A. About eight years.

Q. About eight years? I will ask you, Mr. Wagner, whether it was necessary in the proper operation of that engine and the cars to couple together, whether it was necessary to shove that coupling over as you attempted to do.

Mr. BOYLE: Wait a minute. Don't answer that. I object to that; it calls for the conclusion of the witness. Let him state the facts.

The COURT: I will overrule the objection.

Mr. BOYLE: We except.

Q. Now, state whether it was necessary, and the proper way to do that?

Defendant renewed its objection to the question because the same called for a conclusion of the witness, and said objection was overruled and the witness permitted to answer:

"It was absolutely necessary to shove that draw-head over there to make the coupling—it was absolutely necessary;"

To which action and ruling of the Court defendant then and there excepted in open court, and tenders this, its Bill of Exception, and asks that the same be signed, filed and made a part of the record herein, which is accordingly done.

R. B. MINOR, *Dist. Judge.*

Filing: Filed Jul. 30, 1913. Andres Coy, Jr., District Clerk, Bexar County, Tex. By A. A. Rodriguez, Deputy.

39 *Defendant's Bill of Exception No. 3.*

Filed Jul- 30, 1913.

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WM. WAGNER
vs.
SAN ANTONIO AND ARANSAS PASS RAILWAY COMPANY.

Defendant's Bill of Exception No. 3.

Be it remembered that upon the trial of the above numbered and entitled cause the following proceedings were had: while plaintiff's witness, Dr. C. W. Taylor, was testifying on cross-examination, defendant's counsel, after questioning said witness about his testimony as to the condition of the plaintiff in the suit of Mrs. McDavitt against the San Antonio and Aransas Pass Railway Company, asked the witness the following questions:

"Now then, Dr. Taylor, after you testified in that McDavitt case about her terrible nervous condition and neurasthenic condition as the result of the injury, don't you know it is a fact that the Court

in that case appointed a board of examining physicians, and that they could not find those things you found, and so testified?"

To which counsel for plaintiff objected for the reason that we should not go into these collateral matters; that "anything concerning Dr. Taylor is all right, but if he is putting him up for the purposes of comparison * * * it is improper;" which said objection was sustained by the Court, and counsel for defendant then restated the question as follows:

"The question I asked this witness is this: That if it is not a fact that in the case of McDavitt against the San Antonio & Aransas Pass Railway Company, that you testified that this lady was permanently and hopelessly disabled by reason of traumatic neurasthenia, and that in that case—and that there was a prolapsus of the lady's womb, and is it not a fact that a board of physicians appointed by the Court in that case examined that lady and reported that they did not find the conditions that you stated existed there, but on the *contesry* testified in that case that such conditions did not exist?"

Counsel for plaintiff then renewed his objection to the question for the reason above stated, and the Court overruled said objection and held the same admissible only as going to his skill and competency as a surgeon and physician. Counsel for plaintiff thereupon made the further objection to the question on the ground that it was "irrelevant and immaterial and prejudicial to the plaintiff's case," and the Court overruled said objection and admitted the question as going to the question of the witness's skill and competency as a physician and surgeon and limited to that.

The witness answered:

A. I will tell the jury, in view of this: I think it was a year and a half or a year prior to the time this McDavitt case came up.

Q. Well, wait a minute, Doctor. This is the question I asked you: If it is not a fact these things occurred, and I want an answer to the question. Didn't it occur on that trial?

A. I am going to give it you you, I am going to tell you I knew Mrs. McDavitt's physical condition before she was ever brought to me after having been injured, and I knew her physical condition, that at that time she was a good, strong, healthy young woman, and I am positive of my statement that when I examined her afterwards that she did have a prolapsus and that her nervous system was very badly shattered, to the extent that she had attacks of night terror, when she would wake up, and it just seemed a genuine case of night terrors, frightened all out of her sleep—it was a neu-
40 rotic condition, and I know that not alone—not only from my own examination, but from consultation with Dr. Minnie O'Brien, and I saw her from time to time and I know that was her condition positively, and regardless of whoever examined her on that occasion?

Q. Now, will you answer that question, Doctor—you have made a speech, now will you answer that question?

A. Put the question to me straight and I will answer it.

Q. Read the question, Mr. Stenographer.

(The stenographer thereupon turned to his notes and read the question as follows:)

Q. The question I asked the witness is this: That if it is not a fact that in the case of McDavitt against the San Antonio & Aransas Pass Railway Company, that you testified that this lady was permanently and hopelessly disabled by reason of traumatic neurasthenia, and that in that case—and that there was a prolapsus of the lady's womb, and is it not a fact that a board of physicians appointed by the Court examined that lady and reported that they did not find the condition that you stated existed there, but on the contrary testified in that case that such conditions did not exist?

A. Well, I will have to answer that question in two parts. I did testify as to her—I can't say anything about that other board that examined that woman, because I don't know who examined her for you—I don't know anything about the board.

Q. I am talking about the board appointed by the Court—not for me?

A. Well, I know nothing about that. I simply know that I testified that her physical condition was as stated there, on account of nervous condition and the prolapsus of the womb.

The COURT: Now, Mr. Boyle, if this admitted only as a predicate to that testimony—the testimony of the other physicians, unless that is produced this will be stricken out.

Mr. BOYLE: Yes sir.

Q. Weren't you in the courthouse when these other physicians testified?

42 A. No, sir.

Q. The board of physicians appointed by the Court?

A. No, sir, I was under the rule in that case; I came into court and testified and then left; I was in the ante-room, as I was in this case.

Q. Did you see the report they made in writing to the Court?

A. No, sir.

Q. You did not see it at all?

A. No, sir; I know nothing about it.

Thereafter, on defendant's call, the witness J. T. SMITH, testified as follows:

By Mr. BOYLE:

Q. Your name is J. T. Smith?

A. Yes, it is.

Q. Are you the Official Court Reporter of the 45th District Court of Bexar County?

A. At present, yes, sir.

Q. Were you the Reporter of that Court in 1912?

A. Yes, sir.

Q. At — the case of McDavitt v. San Antonio & Aransas Pass Railway Company was tried there?

A. Yes, sir.

Q. Did you report the testimony in that case?
A. I did.
Q. Have you that report with you?
A. I have the notes of the testimony.
A. You have there the notes of the physicians who testified in that case?
A. I have the notes of the physicians who testified.

Mr. BOYLE: Now, then, if the Court please, I want to ask the witness, Smith, to read from his notes the testimony of Drs. Braunagel, McIntosh and Barnitz, the physicians who testified in that case.

43 Mr. SEHORN: I object to that testimony, because it is hearsay. I object to it further because it is incompetent, irrelevant, and immaterial; I object to it for the further reason that it is not admissible to impeach the integrity or veracity of any witness in this case.

The COURT: I sustain the objection.

Mr. BOYLE: We except to the ruling of the Court, and want our bill to show that this testimony is offered to go to the competency of Dr. Taylor, who testified in this case. All right, Mr. Smith,—the Court sustained the objection to your testimony.

To which action and ruling of the Court defendant then and there in open court excepted, and tenders this, its Bill of Exception, and asks that the same be signed, filed and made a part of the record herein, which is accordingly done.

R. B. MINOR, *Dist. Judge.*

Filing: Filed Jul- 30, 1913. Andres Coy, Jr., District Clerk, Bexar County, Texas. By A. A. Rodriguez.

Defendant's Bill of Exception No. 4.

Filed July 30, 1913.

In District Court, 57th Judicial District, San Antonio, Texas.

No. B-3488.

WM. WAGNER
vs.
S. A. & A. P. Ry. Co.

Be it remembered that upon the trial of this cause while
44 the case was being argued before the jury, the Hon. John Sehorn, attorney for the plaintiff, in the closing argument to the jury used the following language:

"I want this jury to give the plaintiff every cent that it possibly can, under the pleadings and the evidence. You cannot make a mistake in giving him too much, under the evidence, if you do

the court has the power and it is his duty to cut it down; but if you make it too low, even if your verdict should be for Five Dollars, there is no power in this Court, to add even a single postage stamp. Therefore, I again ask you to make your verdict as high as you possibly can under the evidence as you can make no mistake in that direction."

To which language the defendant by its attorneys at the time in open court objected, for the reason that said language in the closing speech was improper and was intended to and would have the effect of prejudicing improperly the minds of the jury against the defendant, and cause the jury to render a verdict not upon the testimony of the case but recklessly under the belief that it rested with the Court to finally fix the proper amount of damages in the case.

This objection was by the Court overruled and defendant excepted, and now here tenders this Bill of Exception and asks that it be approved and signed by the Court and made a part of the record in this cause.

Approved,

R. B. MINOR, *Dist. Judge.*

Filing: Filed July 30, 1913. Andres Coy, Jr., District Clerk, Bexar County, Tex. By A. A. Rodriguez, Deputy.

45 *Defendant's Bill of Exceptions No.* 5.

Filed Jul- 30, 1913.

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WM. WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

Defendant's Bill of Exception No. 5.

Be it remembered, that on Thursday, May 29th, 1913, the defendant's First Amended Motion for a New Trial in the above styled and numbered cause came on to be heard; said motion for new trial complaining of alleged misconduct on the part of the jury in the trial of said cause, and the following testimony was adduced and proceedings had in connection therewith:

The defendant called Juror ERNEST JACKSON, who was first duly sworn by the Clerk, and who in answer to questions propounded, testified as follows:

Direct examination.

By Mr. BOYLE:

Q. Mr. Jackson, you were one of the jurors trying this case of Wagner against the San Antonio & Aransas Pass Railway Company?

A. Yes, sir.

Q. In which a verdict for $15,000 was returned?

A. Yes, sir.

Q. Mr. Jackson, I will ask you whether or not during the deliberation of the jury, while the jury were deliberating as to their verdict, whether or not the argument was advanced by any member of the jury that $20,000 should be given the plaintiff because the plaintiff would have to give one-half to his lawyers?

46 A. Yes, sir, it was.

Q. That argument was made

A. Yes, sir.

Q. Do you remember what juror made that argument?

A. Why, I know him, but I don't know what his name was—that is, I know him when I see him, but I couldn't — you his name.

Q. Was he one of the jurors in the court room?

A. No, sir.

Q. He is not in the court room?

A. No, sir.

Q. Now, how long after he made that argument was it before the jury agreed on a verdict?

A. Well, it was quite a while.

Q. Yes—after he made that argument?

A. Well, he—I say he made the argument—he made it in this way; he brought it up a time or two, and the jury would always—some of them—tell him they wouldn't consider it at all.

Q. Well, did he say that was the reason why he wanted to give him $20,000?

A. Well, you see, I don't know whether he said it was or not, but it seemed from his argument it was—he just said that by the time he divided it between his lawyers that he wouldn't have much left.

Q. Well, now, then, Mr. Jackson, I will ask you how the jury stood in the case on the question of amount originally?

A. Well, I don't know whether I can tell you exactly or not; I think there were seven on the first ballot, the amount stood for $10,000 and I believe there were five for $15,000, I believe the way it was—I am not positive.

Q. One for $20,000?

A. Yes, sir.

Q. That was on your first ballot?

A. Yes, sir.

Q. Now, then, after that when did he make this argument about——

47 A. Well, he spoke about this a time or two during the deliberations, I couldn't tell you just when it was—it was possibly, though, an hour or something like that before I remember his mentioning it the first time.

Q. Before he mentioned it the first time? Did he mention it more than once?

A. Yes, sir.

Q. How many times do you remember he mentioned it?

A. Well, I don't remember hearing him mention it but twice—mentioned it twice.

Q. He mentioned it twice?

A. Yes, sir.

Q. Now, what exactly, did he say, Mr. Jackson, according to your recollection, just his language as nearly as you can state it?

A. Well, I don't believe I can give his language, but my understanding of it was he said if we only gave the man ten or fifteen thousand dollars by the time he divided with his lawyer that he wouldn't have but very little left, didn't think it was just to him; but I don't know what his language was, I don't know his exact language.

Q. Well, what influence did that have on you, Mr. Jackson?

A. None.

Q. How did you stand originally in the case?

A. Ten Thousand.

Q. Ten Thousand?

—. ——.

Q. You went up to fifteen thousand?

A. Yes, sir.

Q. Did you go up to fifteen thousand before or after you heard this contention about the lawyers?

A. Well, I couldn't tell you; it must have been after I heard it once, though, anyway.

48 Q. It was after you heard it once? Did you——

A. I think possibly it was yes.

The COURT: You do plead the effect of this argument upon the jury generally, do you?

Mr. BOYLE: Yes, sir.

Q. Mr. Jackson, what caused you to go up from ten thousand to fifteen thousand dollars in the case?

A. Well, we argued the case around there from different points, and argued about how bad we thought the man was hurt and how much he was entitled to, and general arguments—and why, I decided possibly I was a little bit low at first.

Q. Then did you not take into consideration at all this statement this man made about his attorneys getting a big part of the judgment?

A. No, sir.

Q. You did not take it into consideration at all?
A. No, sir.

Mr. BOYLE (to Mr. Sehorn): That is all.

Cross-examination.

By Mr. SEHORN:

Q. Mr. Jackson, when this statement was made by the juror, did any other members of the jury say anything about you ought not to consider a thing of that sort?
A. Yes, sir,—there were one or two others spoke about it that I know of.
Q. Didn't Mr. Nagel, the foreman, say "That is a matter we cannot consider?"
A. Well, I don't remember whether he did or not.
Q. But some of the jurors did, though?
A. Some of the jurors did, yes, sir.
Q. And as a matter of fact it was not considered among the jurors as far as you know, at all?
A. As far as I know, no, sir.

49 Mr. SEHORN: That is all

(Witness excused.)

The defendant called Juror LOUIS KERNS, who was first duly sworn by the Clerk and who, in answer to questions propounded, testified as follows:

Direct examination.

By Mr. BOYLE:

Q. Mr. Kerns, you were a member of the jury that returned a verdict in this Wagner case?
A. Yes, sir.
Q. I will ask you whether or not during the deliberations of the jury on their verdict, any member of the jury made the argument that a verdict of $20,000 should be rendered in favor of the plaintiff because he would probably have to give his lawyer half of his recovery?
A. Well,——

Mr. SEHORN: I object to the question in that form. Let him state whether or not anything was said about lawyer's fees—because you are leading him.
Mr. BOYLE: All right, I am not leading him at all.

A. Well, there was one juror seemed to think he ought to have $20,000; but so far as talking about the lawyer getting half of it, I don't know—that was cut out, because some gentleman said something about "we are not fixing lawyer's fees, we are just supposed to give him what he is entitled to."
Q. I didn't ask about what was cut out, I asked if anything of that kind was said?

A. Well, it seems there was something said by somebody about it.

Q. Do you know who it was?

A. No, sir.

50 Q. Did you know any of the jurors by name?

A. No, sir.

Q. Was it any of these in the court room?

A. No, sir.

Q. How often did you hear that talk?

A. Well, that wasn't talked to amount to anything at all, because that wasn't a part that was supposed—not for us to decide, I don't think.

Q. When did you hear it, how long after the jury had begun deliberating was it that these remarks were made?

A. What is that?

Q. I say how long after the jury began deliberating on their verdict that these remarks were made—about attorney's fees?

A. Oh, I don't know—quite a little bit, I think.

Q. What exactly was said on the subject according to your recollection?

A. Well, sir, I don't know. The first was whether they all wanted to give him money, and then the next was how much, and of course then they had some little difference.

Q. Well, I mean this statement about attorney's fees, what was the statement made?

A. Well, I didn't hear any of them talk much about the attorney's fees.

Q. Well, you say that was all cut out?

A. Well, it was supposed to have been dropped, you know, because some one of the gentlemen, I don't know what one—but some gentleman said, "We are not supposed to fix the attorney's fees, we are just—that has got nothing to do with us, we don't know whether they are giving the attorney a dollar, or what he is getting, we don't know that."

Q. What I want to get at, what did this gentleman say that talked about attorney's fees?

A. Well, I couldn't tell you. I don't know his name.

Q. Well, I know—but I want to know what he said?

51 A. I don't know who it was.

Q. I want to know what was said?

A. Well, so many—when six or eight gets started to talking that way, you know you can't tell hardly which one did start it.

Q. Well, I know; but what was said on this subject?

A. Well, there wasn't much of anything said on that subject, about what the lawyer should have, so far as the lawyer's part was concerned there wasn't much said about that at all—just except when some man said, "We are not to fix attorneys' fees."

Q. Well, you do not understand what I want to get at. What were the remarks he said?

A. I don't know which one it was.

The COURT: It doesn't matter which one it was but what did he say?

A. Well, I couldnt' tell you, I am sure.

Q. You did not remember what he said?

A. No, sir.

Cross-examination.

By Mr. SEHORN:

Q. Did you consider anything about the lawyer's fee in the case, Mr. Kerns, at all?

A. No sir, I didn't.

Q. It had no influence one way or the other with you?

A. No, sir, that had nothing to do with it.

Q. You considered the evidence as submitted to you in the Court's ruling——

A. That was all.

Q. —and charge?

A. Yes, sir. I didn't consider anything about the attorney's fees at all.

(Witness excused.)

52 The defendant called Juror H. E. ECHTERHOFF, who was first duly sworn by the Clerk and who, in answer to question propounded, testified as follows:

Direct examination.

By Mr. BOYLE:

Q. Give the Stenographer your initials, Mr. Echterhoff.

A. H. E. Echterhoff.

Q. Mr. Echterhoff, you were one of the jurors who sat in the trial of this Wagner case?

A. Yes, sir.

Q. And who returned a verdict in the Wagner case?

A. Yes, sir.

Q. Mr. Echterhoff, I will ask you whether or not any argument was advanced there about the amount the plaintiff should be allowed on account of his attorney getting one-half?

A. Well, the argument was started, but then it was cut out, you know.

Q. Well, who started it, and what was said?

A. Why, when the deliberations were taking place, why, naturally we asked how many were in favor of giving this man damages, or not, and of course they all agreed unanimously he ought to have damages, and when it got to the amount somebody suggested how many were in favor of giving him $10,000; I think the ballot showed seven for $10,000; then there was several didn't rise—that is, we suggested whoever was in favor of $10,000 should rise, and seven rose; and then they got into an argument about it, and four were for $15,000 and one for $20,000, and we deliberated about it.

Q. Now, then, exactly what was said about the question of attorney's fee?

A. Why, then we taken the second ballot, and then ten or eleven were for fifteen thousand dollars—all except one gentleman, who held out for $20,000, and naturally we argued with him, and
53 he claimed it wasn't enough, for the simple reason he had to divide with his attorneys and there wouldn't be nothing left for him; and, of course, we told him we wouldn't consider that at all, it was none of our affair what he paid his attorney.

Q. How often did he make that remark, did he make it more than once?

A. Well, I remember one time he mentioned it.

Q. You did not hear him any other time?

A. No.

Q. Or a second time?

A. No. I didn't consider that at all, I just told him that had nothing to do with it: I don't know what he done with the other people. I didn't consider that at all.

Q. What were you for in the case originally, Mr. Echterhoff?

A. $10,000.

Q. Yes, and you went up to $15,000 afterwards?

A. Yes, sir.

Q. Now, you say that this argument about the attorney's fees did not influence you at all?

A. No, sir, none whatever—I wouldn't listen to it: it was none of our affair how much he paid his attorney.

Q. You told him that, did you?

A. Yes, sir.

Q. What did he say when you told him that?

A. I don't remember what his argument was—I couldn't say.

Q. What?

A. I don't remember what he said to that.

Q. Do you know what juror it was?

A. I think a man by the name of Mr. Monigal, if I am not mistaken.

Q. McMonigal?

A. Yes, sir, McMonigal.

54 Cross-examination.

Mr. SEHORN:

Q. Mr. Echterhoff, did any one else say, "I won't consider that," couldn't consider the attorney's fees business—any other juror remark that? Did Mr. Nagel?

A. Why, I think Mr. Nagel remarked that.

Q. He was foreman of the jury?

A. Yes, sir.

Q. As a matter of fact, did you not consider it?

A. No, sir.

Q. And you do not think any other of the jury did either, do you?

A. No, sir,—I think not.

(Witness excused.)

The defendant called Juror JOSE Y. FLORES, who was first duly sworn by the Clerk, and who, in answer to questions propounded, testified as follows:

Direct examination.

By Mr. BOYLE:

Q. Mr. Flores, you were one of the jurors that tried this Wagner case, weren't you?

A. Yes, sir.

Q. Do you remember during the deliberations of the jury whether one of the members of the jury made the argument that the plaintiff in this case ought to have $20,000 because he would have to give his lawyer half?

55 A. Yes, sir.

Q. Do you remember what juror it was made that remark?

A. No, sir, I just remember it was a tall man, with a big moustache, that is all I can tell you—I don't know his name, don't know which one it was.

Q. Was it Mr. McMonigal, do you remember?

A. I don't know his name.

Q. Now, Mr. Flores, what did he say—what were his remarks?

A. Well, all I remember that he said that he might have to give half to the lawyers, and then somebody else in there—I don't know who it was—said, "The lawyers don't have anything to do with it, we are not taking the case for the lawyers, we are taking the other fellow's case."

Q. Now then, Mr. Flores, how did the jury stand originally when they first started to deliberate on their verdict?

A. Well, it was seven, I believe, for $10,000, and we were four for $15,000, and one for twenty.

Q. How?

A. I say we were seven for ten, and four for fifteen, and one for twenty.

Q. And was it after that that he made this statement about the lawyer's fee?

A. I don't remember.

Q. Now, you say you were for ten thousand dollars?

A. No, sir.

Q. How?

A. No, sir.

Q. What was the amount you were for?

A. Fifteen thousand.

Q. Fifteen?

A. Yes, sir.

Q. You were for that all the time?

A. All the time.

56 Q. Yes, sir. The remarks this man made then did not influence your verdict?

A. No, sir.

Mr. BOYLE: That's all.

Cross-examination.

By Mr. SEHORN:

Q. You did not consider it at all, did you, Mr. Flores?
A. No, sir.

(Witness excused.)

The defendant called Juror FRANK CERMIN, who was first duly sworn by the Clerk, and who, in answer to questions propounded, testified as follows:

Direct examination.

By Mr. BOYLE:

Q. What is your name?
A. Frank Cermin.
Q. Mr. Cermin, were you one of the jurors that tried the Wagner case?
A. Yes, sir.
Q. I will ask you whether or not during the deliberations of the jury in this case you heard any member of the jury use the argument that the plaintiff in this case should have a judgment for $20,000 because he would have to give half to his attorneys?
A. No, sir, I never heard that.
Q. You never heard it?
A. No, sir.
Q. Never heard any talk at all?
A. No, sir. I heard talk about expenses; I didn't hear
57 the other; I was with three fellows who talked about something else.
Q. You heard them talk about expenses?
A. About expenses, what kind of expenses—whether he got expenses, that was all.
Q. And all the kind of talk you heard was about expenses?
A. Yes, sir. I was for $15,000 right away, because they wanted to make it $20,000, and I wouldn't agree; I made it $15,000, though—I wouldn't go up or go any lower.
Q. So you did not hear any remarks of that kind at all?
A. No, sir.

Mr. BOYLE: That is all.
Mr. SEHORN: That is all.
(Witness excused.)
Mr. BOYLE: If the Court please, I would like until tomorrow morning to get these jurors here.
The COURT: Very well, Mr. Boyle. I have got another case set for tomorrow morning. Of course, I can extend this for the term, if absolutely necessary.
Mr. SEHORN: They have had this since the 6th of May, your Honor, and I do not think you ought to delay this any longer; he has had the information since the 6th of May.

Mr. BOYLE: Well, I issued this subpœna in ample time for the Sheriff to get these witnesses, too.

Mr. SEHORN: We will object to having it in the morning.

Mr. BOYLE: I will issue another subpœna with the argument of the other grounds of defendant's Motion, with the understanding that he would have the other jurors present the following morning.

58

FRIDAY, May 30, 1913.

Court reconvened 9 o'clock a. m.

The defendant called Juror W. E. LOVE, who was first duly sworn by the Court, and who in answer to questions propounded, testified as follows:

Direct examination.

By Mr. BOYLE:

Q. Mr. Love, your name is W. E. Love?

A. Yes, sir.

Q. Mr. Love, you were one of the jurors who sat in the trial of the case of Wagner against the Aransas Pass Railroad?

A. Yes, sir.

Q. You were one of the jurors who returned a verdict in that case?

A. Yes, sir.

Q. Mr. Love, I will ask you whether or not any member of the jury, while the jury was deliberating on that verdict made the argument that Plaintiff should have a twenty-thousand dollar verdict, because his lawyer would get half, probably get half?

A. Why, there might have been something said to that effect, I don't remember.

Q. How is that?

A. I don't remember it, I say.

Q. Well, then, Mr. Love, you read this affidavit? (Handing paper to witness.)

A. I say, there might have been something to that effect.

Q. Yes, sir. Well, now, will you refresh your memory from this affidavit? You made this affidavit, didn't you, in this case? I just want you to read that to refresh your recollection.

A. (Witness did not answer.)

Q. Mr. Love, you made that affidavit, didn't you?

59 A. Yes, sir.

Q. Well now you have read it over?

A. Part of it—I read the biggest part of it, I didn't read it all.

Q. Yes, sir. Well, now, I will ask you whether, during the deliberations of the jury on their verdict, if some member of the jury, did not make the remark that Plaintiff ought to have Twenty Thousand dollars—because his attorneys ——

A. Well, I don't know whether he made any argument—I be-

lieve there was some one who made that remark, that probably he would have to give half to his attorneys—I don't know.

Q. Well, what did he say?

A. I couldn't tell you?

Q. How?

A. I couldn't tell you.

Q. Well, you say here——

A. I just heard the remarks made—paid no attention to them.

Q. Well what were the remarks, that is what I want to get at?

A. Well, might have to give half, I suppose—might have.

Q. Might have to give half to whom?

A. To his attorneys.

Q. Well, why did he use that remark, what did he say in connection with it?

A. I don't know.

Q. What?

A. I don't know.

Q. Well, now, Mr. Love, in this affidavit you say:

"Affiant further deposes and states that while members of the jury were considering of their verdict, some member of said jury, who was contending that a twenty-thousand dollar verdict should be rendered for the plaintiff, used as an argument that the plaintiff should have that sum, because he would probably have to
60 give one-half hereof to his attorney." Is that true?

A. Well, I don't know about his being required to do it; we were just making the supposition; I only heard the conversation, that was all.

Q. Well, that is all I am asking you about.

A. Well, I have repeated it once or twice.

Q. No, sir, you have not—that is just what I am getting at.

Mr. SEHORN: Wait a minute. Now, I don't believe that Mr. Boyle has a right to lead this witness. He has got an affidavit from him, procured it from him, and it is his witness.

The COURT: There is no occasion for leading him.

Mr. SEHORN: Now, he is here, and counsel and he can just state what happened; and the witness is apparently very frank about it, and I do not think counsel has a right to lead him right up and ask him if he did not say one thing or another.

Mr. BOYLE: If the Court please, I do not understand he is my witness. I understand it is the Court's duty to have him examined.

The COURT: Well, I do not think there is any necessity to lead him.

Mr. BOYLE: He has made an affidavit; I am certainly entitled to ask him if he did not make an affidavit to that effect and if that is true or not.

The COURT: Well, you can ask him that.

Mr. BOYLE: And on the proposition of this juror being my witness, if Mr. Sehorn is familiar with the statute, he ought to know that if a thing of this kind comes up, it is the duty of the Court to make inquiry of the witness. He is not my witness.

The COURT: You can ask that question, Mr. Boyle.
Mr. BOYLE: All right, sir.

Q. Now then, Mr. Love, you made this affidavit, that I showed you just now?

A. Yes, sir.

61 Q. Now, you state in this affidavit, that while the members of the jury were considering their verdict, some member of said jury who was contending that a verdict of twenty-thousand dollars should be rendered for plaintiff, used as an argument for the position he took that plaintiff should have a verdict for that sum, because he would be required to give probably one-half to his attorney. Now, is that true, Mr. Love?

A. Why, it must be.
Q. What?
A. Yes, sir,—I told you it was.
Q. Yes—that is true?
A. I heard the conversation, but he didn't make it direct to me—he made it to other people.
Q. Well, whom did he make it to?
A. I don't know—I don't know none of the jurors.
Q. What?
A. I don't know any of the jurymen.
Q. You did not know any of them?
A. No sir,—except one man.
Q. Well, what were the jury doing at the time he made this remark?
A. Why, we were all holding council over the verdict.
Q. You were deliberating on your verdict?
A. Certainly.
Q. Well, was the remark addressed to you, or to the whole jury, or to any particular member of the jury?
A. Well, I don't know—it wasn't to me, it was to some one else.
Q. Well, was it loud enough for you to hear it?
A. Why, I heard it, yes sir.
Q. What?
A. Yes, I heard it.
Q. Was it loud enough for the balance to hear it or not?

Mr. SEHORN: I protest against this examination, Your
62 Honor—I do not think that it is the right way to get at this thing—let him state what happened, and not lead the witness.

Mr. BOYLE: Well, I started to get at it that way awhile ago, and he said he didn't remember.

The COURT: Go ahead, Mr. Boyle, I overrule the objection.

Q. Now then, Mr. Love, in this affidavit you made you also stated that this juror contended that very likely the plaintiff had been advanced as much as one thousand or eleven hundred dollars by said attorneys during the period between the time said attorneys were employed by him and the trial of the case, and that he further

argued that when these amounts had been paid, plaintiff would only have between eight and ten thousand dollars, and argued and insisted that they render a verdict for twenty thousand dollars, or some sum in that neighborhood. Is that true?

A. Yes, sir.

Q. Now, did he make these remarks, how often did he make these remarks?

A. Oh, I don't know, I couldn't tell you.

Q. What?

A. I don't know.

Q. Did he make them more than once?

A. Well, I don't know whether this particular man made them—there were so many men there; some of them made it.

Q. Was there more than one man made these remarks?

A. Why, I don't know I couldn't tell you.

Q. What?

A. I don't know.

Q. You do not remember whether any other man made these remarks, or not?

A. Well, I couldn't say whether any particular man did; I heard the remarks made in the jury room.

63 Q. You heard the remarks made in the jury room?

A. Yes, sir.

Q. Now, then, Mr. Love, how did the jury stand when they first took a vote on their verdict?

A. Why, I don't remember.

Q. Well, in this affidavit, Mr. Love, you state this: "That affiant makes oath and testified that he himself and some other members of the jury were of opinion that a verdict that from eight to ten or eleven thousand dollars was ample in this case." Is that true?

A. Well, some of us thought that would range about right, some of them didn't—some thought higher.

Q. Mr. Love, I will ask you whether or not you can remember what member of the jury it was that made these remarks, whether you remember which one of the jurors it was that made these remarks?

A. I don't know, I couldn't tell you.

Q. Well, do you remember the business, or the occupation, what work he was engaged in, his business?

A. I don't know; I didn't——

Q. Now, then, Mr. Love, you say you do not remember whether these remarks were made more than once or not, is that right?

A. Well, they might have been made often, I don't know.

Q. How is that?

A. I say they were made one time, might have been made often.

Q. Well now, Mr. Love, I will ask you whether or not you considered these remarks that this man made?

A. Well, they didn't have any bearing on me, these remarks.

Q. They did not have any bearing on you? What remarks, if any, did anybody else make at this time?

A. Oh, I couldn't tell you.

Q. Did you hear anybody else say anything at the time that this juror made these remarks?
A. Oh, I heard lots of stuff—but I couldn't tell you.
Q. What?
64 A. I say I merely heard a good deal of talking—I couldn't tell you
Q. I will ask you whether any other juror made any other remarks in response to this man's remarks?
A. Why, I couldn't — you my friend.
Q. I will ask you whether you heard any other juror make any other remarks?
A. Why, I heard them—I heard them talk, yes; but I couldn't tell you what the conversation was.
Q. You do not know what the conversation was?
A. Why, I don't understand, I didn't understand what the replies were.
Q. How?
A. I say I don't remember what the replies were.
Q. Well, do you remember whether you heard any replies or not?
A. Oh, I suppose they made some, bound to.

Mr. BOYLE: That is all.

Cross-examination.

By Mr. SEHORN:

Q. Mr. Love, when you heard that remark made, didn't you hear some of the jurors say: "We have got nothing to do with that?"
A. I don't know but what I made that remark myself.
Q. You made that remark yourself?
A. I think I did.
Q. Did you consider it at all?
A. No, sir.
Q. It had nothing to do with making up your verdict at all?
A. No, sir, it had no bearing on it at all.
65 Q. You did not consider it?
A. I did not consider it; it was none of my business.
Q. You were not influenced by it at all?
A. No, sir.
Q. You did not take it into consideration in any way?
A. No, sir.

Mr. SEHORN: That is all.

Redirect examination.

By Mr. BOYLE:

Q. Mr. Love, I believe you stated you originally stood for seven or eight or ten thousand dollars in this case—is that right?
A. Yes, sir.

Q. And you subsequently stood for a verdict of fifteen thousand dollars?
A. Yes.

(Witness excused.)

The defendant called Juror RAMON T. HERNANDEZ, who was first duly sworn by the Court, and in answer to questions propounded, testified as follows:

Direct examination.

By Mr. BOYLE:

Q. Give your name to the stenographer, please, Sir?
A. R. T. Hernandez.
Q. Mr. Hernandez, you were one of the jurors who tried the case of Wagner against the San Antonio and Aransas Pass Railway Company?
66 A. Yes, sir.
Q. I will ask you, Mr. Hernandez, while the jury were deliberating on their verdict, whether or not any member of the jury made the remark that the plaintiff in this case ought to have a verdict of twenty thousand dollars, because he would probably have to give half of it to his lawyer?
A. No, sir.
Q. Never made any such remark?
A. I didn't hear nothing.
Q. You did not hear it?
A. No, sir.
Q. Well, Mr. Hernandez, every other member of this jury who has testified says that such remark was made?
A. Well, I don't know nothing about it.
Q. You never heard it?
A. No, sir.

Mr. BOYLE: That is all.
Mr. SEHORN: That is all, Mr. Hernandez.

(Witness excused.)

The Defendant called Juror D. E. TIMBERLAKE, who was first duly sworn by the Court, and who, in answer to questions propounded, testified as follows:

Direct examination.

By Mr. BOYLE:

Q. Mr. Timberlake, give your name to the stenographer, here?
A. D. E. Timberlake.
67 Q. Mr. Timberlake, you were a member of the jury that tried the case of Wagner against the San Antonio & Aransas Pass Railway Company?
A. Yes, sir.

Q. I will ask you, Mr. Timberlake, whether or not, while the jury was deliberating on their verdict in this case, whether a member of the jury made the remark there that the plaintiff in this case ought to have a verdict of twenty thousand dollars because his lawyers would probably get half of the judgment in the case?

A. I don't remember hearing it, Mr. Boyle.

Q. You never heard it?

A. No, sir.

Q. Never heard it at all?

A. No, sir, I don't remember hearing it. Of course, the jury room is a pretty good sized room, you know.

Mr. BOYLE: That is all.

Mr. SEHORN: That is all, Mr. Timberlake.

(Witness excused.)

The Defendant called Juror RUDOLPH NAGEL, who being first duly sworn by the Court, in answer to questions propounded, testified as follows:

Direct examination.

By Mr. BOYLE:

Q. Mr. Nagel, give the stenographer your name?

A. Rudolph Nagel.

Q. Mr. Nagel, you were a member of the jury that set in the trial of Wagner vs. The San Antonio & Aransas Pass Railway Company, weren't you?

68 A. Yes, sir.

Q. I will ask you, Mr. Nagel, whether during this—during the deliberations of the jury, whether any member of the jury made a remark that the plaintiff in this case ought to have a verdict of twenty thousand dollars because his attorneys would probably get half of the recovery?

A. Well, I really don't remember whether—somebody made the remark that he should have twenty thousand dollars, but whether his attorney would get half of that, I don't remember that that remark was made.

Q. You do not remember whether any such remark was made?

A. No, sir.

Q. Isn't it a fact that that remark was made, Mr. Nagel, and that you stated they would have to cut out that kind of discussion—isn't that true?

A. It wasn't considered.

Q. What?

A. I say it wasn't considered.

Q. Well, I am asking you now if it is not a fact that the remark was made?

A. The remark was made that the attorney would get some of that, but I told them they wouldn't have to consider the contract between Mr. Wagner and his attorney.

Q. Well, then, you do remember that something was said—about——

A. About attorney's fees.

Q. About attorney's fees?

A. Yes, sir.

Q. Then you were the man that told them to cut it out, not to consider it?

A. Yes, sir.

Mr BOYLE: That is all.

69 Cross-examination.

By Mr. SEHORN:

Q. Did you consider it, Mr. Nagel, in rendering your verdict?

A. No, sir.

Q. It didn't have any influence on you one way or the other?

A. No, sir.

Q. Or on anybody else?

A. No, sir.

Mr. STOREY: Hold on. He can't tell what influence it would have on anybody else.

A. I wouldn't undertake to say.

Redirect examination.

By Mr. BOYLE:

Q. Mr. Nagel, you cannot undertake to say what influence that had on anybody else?

A. No, sir; but I can say it didn't have any influence on me.

Q. Who was it made that remark?

A. I don't know.

Q. Wasn't it Mr. McMonigal, the man who works for the brewery?

A. I don't know.

Q. You do not know?

A. No, sir.

(Witness excused.)

70 Mr. BOYLE: I will ask the Court to issue an attachment for Juror McMonigal. He has been subpœnaed twice by me in this case.

Mr. SEHORN: Well, the juror was here yesterday.

The COURT: Well, he ought to have stayed here, Mr. Sehorn.

Mr. SEHORN: Well, he was discharged——

(A few minutes later Juror McMonigal came into the court room.)

Thereupon the Defendant called Juror E. McMONIGAL, who was first duly sworn by the Court and who, in answer to questions propounded, testified as follows:

Direct examination.

By Mr. BOYLE:

Q. Mr. McMonigal, you were one of the jurors that tried this case of Wagner vs. The San Antonio & Aransas Pass Railway Company?
A. Yes, sir.
Q. I will ask you whether or not during the deliberations of the jury as to their verdict in this case, whether or not you made the remark to the other members of the jury that the plaintiff in this case ought to have a verdict for twenty thousand dollars, because he would probably have to pay half to his lawyers?
A. What is that?
Q. I asked you whether, while the jury were in the jury room considering their verdict, whether you made the remark that the plaintiff in this case ought to have a verdict for twenty thousand dollars because his lawyer would probably get half of the verdict for attorney's fees?
A. No, I did not.
Q. You did not?
A. No, sir.
71 Q. I will ask you, Mr. McMonigal, whether you heard any member of the jury——
A. No, sir, I did not.
Q. —make this remark?
A. No, sir, I did not.
Q. You did not hear anybody else make this remark?
A. No, sir.
Q. Mr. McMonigal, during the deliberations on the verdict in this case, how did the jury stand when they first considered their verdict?
A. Why, as near as I can remember, there was three of us for twenty thousand dollars, one for sixteen, one for eighteen, I believe two or three for twelve thousand—that is, to the best of my recollection.
Q. Yes. Well now, Mr. McMonigal, some of the other jurors in this case have testified that about seven members of this jury were for from eight to ten thousand dollars; have you got any recollection as to that?
A. No, I haven't; I didn't hear either one of them sums mentioned, I don't think.
Q. You were for twenty thousand dollars?
A. Sir?
Q. I say——

The COURT: He did not say he was for twenty thousand dollars.
Mr. SEHORN: Yes, he did.
Mr. BOYLE: He said, "three of us."

A. The best of my recollection was, we were for twenty thousand dollars to start with.

Q. Three of you?

A. I think so, yes, as near as I can remember.

Q. Do you know who the three were?

72 A. I don't know any of the names; if I would meet them face to face I might know them, but that is all—I don't remember any of the men's names.

Q. You say you did not hear any remark at all about attorney's fees?

A. No, sir.

Q. Nothing at all?

A. Not a word that I can remember, no, sir?

Mr. BOYLE: That is all.

Mr. SEHORN: That is all, Mr. McMonigal.

(Witness excused.)

Mr. BOYLE: I think, if the Court please, that is all the jury we have been able to get here; I think we have all of them but two. Now then to be in the attitude, as far as the record shows, of trying to get these other jurors here—Hierhozer and Gimble.

The COURT: Well, I will give you such time as I can Mr. Boyle. The Court has got to be closed up tomorrow, we have got a great deal to do tomorrow.

Mr. BOYLE: I understand. I will get after the sheriff's office on those two jurors. They haven't issued a return yet on the second subpœna issued yesterday.

The COURT: You can have all the process you want.

Mr. BOYLE: Yes, sir. I will issue subpœnaes for those two jurors.

The COURT: You can issue attachments for them, if you think you are in the right.

Mr. BOYLE: Yes, sir. I will ask the Court to give me until tomorrow morning on these two.

73 The COURT: Yes, sir.

(The further hearing of Defendant's First Amended motion for a new trial continued until the following morning.)

SATURDAY, May 31, 1913.

Court convened at 9 o'clock a. m.

The Defendant called Juror JOSEPH HIERHOZER, who was first duly sworn by the Court, and who in answer to questions propounded, testified as follows:

Direct examination.

By Mr. BOYLE:

Q. Mr. Hierhozer, you were one of the jury that tried the case of Wm. Wagner vs. The San Antonio & Aransas Pass Railway Company?

A. Yes.

Q. In this Court?
A. Yes.
Q. I will ask you whether or not, Mr. Hierhozer, while the jury were deliberating on the verdict, any member of the jury made the remark that the plaintiff in this case ought to have a judgment for twenty thousand dollars because he would probably have to pay half to his lawyers?
A. I couldn't say that.
74 Q. What?
A. I couldn't say that, judge.
Q. You did not hear it?
A. I heard them make some mention about it, but I don't know who said it.
Q. Well, I didn't ask you who said it. I asked you whether you heard that remark made.
A. Yes, sir.
Q. What?
A. They mentioned something about it, but I didn't pay no attention to it, I didn't know what they were talking about.
Q. Do you remember what was said?
A. No, no—I was over there outside on the rear, I wasn't in there. There were some mentioned it there, but I don't know who it was.
Q. You say there was some mention of the kind, but you don't know who it was?
A. And I understand they said something, wanted to know how much a lawyer gets, or something like that; but I was out on the rear, I didn't notice at all, didn't make mention about it.
Q. You made no mention about it?
A. No.
Q. Well, was that all you heard, that somebody wanted to know what the lawyer got out of it?
A. Yes, that is all I know, I didn't hear anything more.
Q. Well, did you hear anybody say anything in reply to his question?
A. No, I did not.
Q. What?
A. I couldn't say.
Q. That is all the conversation you heard?
A. Yes, sir.

Cross-examination.

By Mr. SEHORN:

Q. Did you consider that subject at all in rendering your
75 verdict?
A. No, I didn't consider it.
Q. Wasn't it said there in the jury room they had nothing to do with it?
A. I couldn't say.
Q. You could not say?

A. No, sir.
Q. But you did not consider it at all?
A. No, sir.

(Witness excused.)

Mr. BOYLE: Now, if your Honor please, I want to offer these three subpœnaes. The Sheriff says he cannot find John Gimble, but I want to offer these three subpœnaes here that I mentioned, for the purpose of showing we have been unable to find Juror John Gimble. As soon as Mr. Tobin makes return on the other one—he said he would make it in a few minutes—but said his office had been unable to find Gimble.

(The three subpœna-s offered in evidence by the defendant as above set out, are in words and figures as follows, to-wit:

THE STATE OF TEXAS,
County of Bexar:

The State of Texas to the Sheriff or any Constable of Bexar County, Greeting:

You are hereby commanded to summon Louis Kerns, 608 Montana, E. McMonigal, 220 Sherrer, Jose Y. Flores, 220 Furnish Ave., Rudolph Nagel, 311 Belmont, Joseph Hierhozer, R 2, John Gimble, 816 S. Presa, W. E. Love, Elmendorf, Ramon T. Hernandez, 619 S. Laredo, D. E. Timberlake, 307 Garza, Frank Cermin, 134 Leopold, Ernest Jackson, 3018 W. Houston, H. E. Echterhoff, 405 S. Olive, if to be found in your County, to be and appear on Thursday May 29th, A. D. 1913, at 2 o'clock P. M., before our Honorable District Court of the 57th District, in and for the County of Bexar, at the Court House thereof, in the City of San Antonio, then and there to give evidence in a case therein pending wherein Wm. Wagner is plaintiff, and S. A. & A. P. Ry. Co. is defendant on behalf of the defendants and there remain from day to day and term to term thereof until discharged by due process of laws.

76

Herein fail not, but of this writ make due return.

Witness Andres Coy, Jr., Clerk of the District Court of Baxter County, Texas, this 27th day of May, A. D., 1913.

(Signed) ANDRES COY, JR.,
Clerk District Court, Bexar County,
By A. A. RODRIGUEZ, *Deputy.*

(Issued same day.)

Sheriff's Return.

Came to hand on the 27th day of May A. D. 1913 and executed on the 28 and 29 day of May A. D. 1913, at — o'clock — M. by reading the within subpœna in the hearing of the witnesses named within, but not executed as to John Gimble, Jose Y. Flores not at address given. Joseph Hierhozer, W. E. Love, Frank Ceriman, not

known., witnesses named within. The cause of my failure to serve said witnesses is at follows: —.

Returned on this the 29 day of May A. D. 1913.

JOHN W. TOBIN,
Sheriff of Bexar County, Texas,
By SAM C. SLACK, *Deputy.*

Fees:

Summoning 6 witnesses....	$3.00
Mileage, 20 miles.....	1.00
Total	$4.00

77 (Endorsed on back:) 57th. Judicial District. No. B-3488. Wm. Wagner vs. S. A. & A. P. Ry. Co. Subpœna. To April Term, A. D., 1913. Filed May 30, A. D., 1913. Andres Coy, Jr. Clerk District Court, Bexar County. By George W. Huntress, Jr., Deputy.

THE STATE OF TEXAS,
County of Bexar:

2nd Subpæna.

The State of Texas to the Sheriff or any Constable of Bexar County, Greeting:

You are hereby commanded to summon E. McMonigal, Lone Star Brewery; Rudolph Nagel, Steves Lumber Yard; D. E. Timberlake, 307 Garza; Ramon T. Hernandez, 619 S. Laredo, John Gimble, 816 S. Presa; Joseph Hierhozer, R. 2; W. E. Love, Elmendorf, if to be found in your county, to be and appear on Friday May 30, A. D., 1913 at 9 o'clock A. M., before our Honorable District Court, of the 57th District, in and for the County of Bexar, at the Court House thereof, in the City of San Antonio, then and there to give evidence in a case therein pending, wherein William Wagner
78 is plaintiff, and S. A. & A. P. Ry. Co. is defendant on behalf of the defendant and there remain from day to day and term to term thereof until discharged by due process of laws.

Herein fail not, but of this writ make due return.

Witness Andres Coy, Jr., Clerk of the District Court of Bexar County, Texas, this 29 day of May A. D. 1913.

ANDRES COY, Jr.,
Clerk District Court, Bexar County.
By GEORGE W. HUNTRESS,
Deputy.

(Issued same day.)

Sheriff's Return.

Came to hand on the 29 day of May A. D. 1913 at — o'clock — M, by reading the within Subpœna in the hearing of the wit-

nesses named within, but not executed as to Joseph Hierhozer and John Gimble. witnesses named therein. The cause of my failure to serve said witnesses is as follows. —.

Returned on this the 30 day of May A. D., 1913.

JNO. W. TOBIN,
Sheriff of Bexar County, Texas.
By A. NEWTON, *Deputy.*

Summoning 5 witnesses.....	$2.50
Mileage, 50.....	2.50
Total	$2.50

Endorsed on back: 57th Judicial District. No. B-3488. Wagner vs. S. A. & A. P. Ry. Co. Subpœna. To April Term, A. 79 D., 1913. Filed May 31, A. D. 1913. Andrez Coy, Jr., Clerk District Court, Bexar County. By A. A. Rodriguez, Deputy.

Third Subpœna.

THE STATE OF TEXAS:
County of Bexar:

The State of Texas, to the Sheriff or any Constable of Bexar County, Greeting:

You are hereby commanded to summon Joseph Hierhozer, John Gimble; if to be found in your County, to be and appear on Saturday, May 31, A. D., 1913, at 9 o'clock A. M., before our Honorable District Court of the 57th District, in and for the County of Bexar, at the Court House thereof, in the City of San Antonio, then and there to give evidence in a case therein pending, wherein Wm. Wagner is plaintiff, and S. A. & A. P. Ry. Co. is defendant on behalf of the Deft. and there remain from day to day and term to term thereof until discharged by due process of laws.

Herein fail not, but of this writ make due return.

Witness, Andres Coy, Jr., Clerk of the District Court of Bexar County, Texas, this 30 day of May A. D., 1913.

ANDREZ COY, JR.,
Clerk District Court, Bexar County.
By A. B. KLIEFOTH, *Deputy.*

(Issued same day.)

80 *Sheriff's Return.*

Came to hand on the 30 day of May A. D. 1913 and executed on the 30 day of May A. D. 1913 at 3 o'clock P. M., by reading the within Subpœna in the hearing of the witnesses named within, but not executed as to John Gimble, not found after diligent search and inquiries — witnesses named within. The cause of my failure to serve said witnesses is as follows: —.

Returned on this the 31 day of May A. D. 1913.

JNO. W. TOBIN,
Sheriff of Bexar County, Texas.
By —— ——, *Deputy.*

Fees:

Summoning 1 Witness	$.50
Mileage 24	1.20
Total	$1.70

Endorsed on back: 57th Judicial District. No. B-3488. Wm. Wagner vs. S. A. & A. P. Ry. Co. Subpœna. To April Term, A. D. 1913. Filed May 31, A. D. 1913. Andres Coy, Jr., Clerk District Court, Bexar County, by A. A. Rodriguez, Deputy.

81 Thereupon, the Court having heard argument thereon, overruled said motion for new trial and refused to set said verdict aside for said alleged misconduct of the jury, to which action of the Court the defendant then and there in open court excepted, and here now tenders its Bill of Exception No. 5, and asks that the same be allowed, filed and made a part of the record in this cause, which is accordingly done.

R. B. MINOR,
Dist. Judge.

Filing: Filed Jul- 30, 1913. Andres Coy, District Clerk, Bexar County, Tex., by A. A. Rodriguez, Deputy.

Supersedeas Appeal Bond.

Filed July 17, 1913.

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WM. WAGNER
vs.
S. A. & A. P. RY. CO.

Whereas, in the above entitled and numbered cause pending in the 57th District Court of Bexar County, Texas, and at a regular term of said Court, to-wit, on the 2d day of May, A. D., 1913, the said Wm. Wagner recovered judgment against the said San Antonio & Aransas Pass Railway Company in the sum of Fifteen Thousand Dollars ($15,000.00) with interest thereon from the 2d day of May, A. D., 1913, at six per cent per annum, and all costs of suit; and

Whereas, on the 31st day of May, A. D., 1913, a motion there-

tofore filed by the said San Antonio & Aransas Pass Railway
82 Company praying for a new trial was overruled, to which action of the Court the said San Antonio & Aransas Pass Railway Company then and there excepted and gave notice of appeal to the Court of Civil Appeals of the Fourth Supreme Judicial District at San Antonio, from which judgment and order the said San Antonio & Aransas Pass Railway Company has taken an appeal to the Court of Civil Appeals of the Fourth Supreme Judicial District at San Antonio, in the County of Bexar and State of Texas;

Now, therefore, we, the San Antonio & Aransas Pass Railway Company, as principal, and U. S. Fidelity and Guaranty Co. and —— —— as sureties, acknowledge ourselves bound to pay said Wm. Wagner the sum of Thirty-one Thousand Dollars ($31,000.00) conditioned that the said Antonio & Aransas Pass Railway Company, appellant, prosecute its appeal to effect, and in case the judgment of the Supreme Court or of the Court of Civil Appeals shall be against it the said Antonio & Aransas Pass Railway Company shall perform such judgment, sentence or decree and pay all such damages as said Courts may award against it.

Witness our hands this 17th day of June, A. D., 1913.

SAN ANTONIO & ARANSAS PASS
RAILWAY CO.,
By HOUSTON, BOYLE & STOREY,
Attorneys, Principal.

U. S. FIDELITY AND GUARANTY CO.,
[SEAL.] By WM. L. STILES,
Agent and Attorney in Fact, Sureties.

I have fixed the probable amount of the costs of this suit in the Court of Civil Appeals, the Supreme Court, and the Court below, as $—, and have approved the foregoing bond this the 17 day of June, A. D., 1913.

ANDRES COY, JR.,
Clerk of the District Court
83 *of Bexar County, Tex.,*
By A. B. KLIEFOTH, *Deputy.*

Filing: Filed Jun. 17, 1913. Andres Coy, Jr., District Clerk, Bexar County, Tex. By A. B. Kliefoth, Deputy.

Application for Extension of Time for Filing Statement of Facts.

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WM. WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

To the Hon. R. B. Minor, Judge of said Court:

Now comes the defendant, San Antonio & Aransas Pass Railway Company, and represents and snows to the Court that the official reporter of this Court has been unable to prepare the statement of facts in this cause within the time allowed by the Court in its order heretofore entered herein, and asks that the Court extend the time for filing such statement of facts for twenty days from date hereof.

HOUSTON, BOYLE & STOREY,
Attorneys for Defendant, San Antonio & Aransas Pass Railway Company.

Filing: Filed Jul. 30, 1913. Andres Coy, Jr., District Clerk, Bexar County, Tex. By A. A. Rodriguez, Deputy.

84 *Order Extending Time for Filing Statement of Facts.*

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WM. WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

(In Vacation.)

WEDNESDAY, July 30th, 1913.

This day came on to be heard the application of the defendant for the extension of time for filing statement of facts herein, and it appearing to the Court that the official reporter of this Court has been unable to prepare the statement of facts in this cause within the time allowed by the order heretofore entered in this cause.

It is, therefore, ordered that the defendant be, and it is hereby allowed an extension of time of twenty days from date hereof in which to prepare and file statement of facts in this cause.

R. B. MINOR,
Judge District Court, 37th Judicial District, Bexar County, Texas.

Entry: Ent. Vol. 9, Page 128.

85 *Application for Extension of Time, etc.*

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WM. WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

TUESDAY, August 19th, 1913.

Now comes the defendant, San Antonio & Aransas Pass Railway Company, and represents and shows to the Court that the official reporter of this Court has been unable to prepare the statement of facts in this cause within the time allowed by the Court in its original order herein, nor within the time allowed by the supplemental order herein, and asks that the Court extend the time for filing such statement of facts for ten days from date hereof.

HOUSTON, BOYLE & STOREY,
Attorneys for Defendant, San Antonio & Aransas Pass Railway Company.

Filing: Filed Aug. 19, 1913. Andres Coy, Jr., District Clerk, Bexar County, Texas. By A. B. Kliefoth, Deputy.

86 *Order Extending Time, etc.*

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WM. WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

(In Vacation.)

TUESDAY, August 19th, 1913.

This day came on to be heard the application of the defendant for an extension of time for filing statement of facts herein and it appearing to the court that the official reporter of this court has been unable to prepare the statement of facts in this cause within the time allowed by the orders heretofore entered in this cause.

It is, therefore, ordered that the defendant be, and it is hereby, allowed an extension of time of ten days from date hereof, in which to prepare and file statement of facts in this cause.

R. B. MINOR,
Judge of the District Court, 57th Judicial District, Bexar County, Texas.

Entry: Ent. Vol. "9," Page 128.

87 *Application for Extension of Time.*

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WILLIAM WAGNER
vs.
S. A. & A. P. RY. CO.

FRIDAY, August 29, 1913.

Now comes the defendant, San Antonio & Aransas Pass Railway Company, and represents and shows to the Court that the official reporter of this Court has been unable to prepare the statement of facts in this cause within the time allowed by the Court in its original order herein, nor within the time allowed by the supplemental order herein, and asks that the Court extend the time for filing such Statement of Facts for five days from date hereof.

HOUSTON, BOYLE & STOREY,
Attorneys for Defendant, San Antonio & Aransas Pass Railway Company.

Filing: Filed Aug. 29, 1913. Andres Coy, Jr., District Clerk, Bexar County, Texas, by A. B. Kliefoth, Deputy.

88 *Order Extending Time, etc.*

In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WILLIAM WAGNER
vs.
S. A. & A. P. RY. CO.

(In Vacation.)

FRIDAY, August 29th, 1913.

This day came on to be heard the application of the defendant for an extension of time for filing statement of facts herein, and it appearing to the court that the official reporter of this court has been unable to prepare the statement of facts in this cause within the time allowed by the orders heretofore entered in this cause:

It is therefore ordered, that the defendant be, and it is hereby allowed an extension of time of five days from date hereof in which to prepare and file Statement of facts in this cause.

R. B. MINOR,
Judge of the District Court, 57th Judicial District, Bexar Co., Texas.

Entry: Ent. Vol. "9," Page 128.

89 District Court, 57th Judicial District, in and for Bexar County.

WM. WAGNER
vs.
S. A. & A. P. RY. CO.

Clerk's Fees.

Docketing	$.20
Citations, Copies & Returns	1.25
Approving Bonds	1.50
Docketing Motions	.45
Filing Papers	5.40
Entering Appearances	.15
Entering Continuances	.20
Entering Orders	6.75
Entering Judgments	1.00
Subpœnas	1.00
Additional Names	3.00
Swearing Witnesses	1.70
Empaneling Jury	.35
Receiving and Recording Verdict	.35
Affidavits	2.50
Transcript	47.50
Attachment for Witness	.50
Total Clerk's Cost	$74.05

Sheriff's Fees.

Executing Writs	$.50
Executing Citations	.75
Executing Subpœnas	12.00
Jury Fee	.50
Mileage	9.75
Total Sheriff's Fees	$23.50

Recapitulation.

Clerk's Fees	$74.05
Sheriff's Fees	23.50
Jury Fund	5.00
Stenographer's Fees	3.00
Witness Fees	6.06
Total Amount Due	$111.61

90 *Certificate.*

THE STATE OF TEXAS,
County of Bexar:

I, Andres Coy, Jr., Clerk of the District Courts of Bexar County, Texas, do hereby certify that the foregoing Ninety (90) pages contain a true and correct transcript of all the orders and proceedings had in a cause on the Civil Docket of the District Court of the 57th Judicial District of Bexar County, Texas, numbered No. B-3488 wherein Wm. Wagner is Plaintiff and The San Antonio & Aransas Pass Ry. Company is Defendant.

Witness my hand and seal of said Court, at office in the city of San Antonio, this the 2nd day of Sept., A. D., 1913.

[SEAL.] ANDRES COY, JR.,
District Clerk Bexar County, Texas.
By A. B. KLIEFOTH, *Deputy.*

91 Endorsements on Record: No. 5206. San Antonio & Aransas Pass Railway Co., Appellant, vs. William Wagner, Appellee. From the District Court of Bexar County, 57th Judicial District

of Texas. Applied for by Houston, Boyle & Storey, Attorneys of record for Appellant on the 17th day of June, 1913, and delivered to Houston, Boyle & Storey, on the 2nd day of September, 1913. Andres Coy, Jr., Clerk District Court, Bexar County, By A. B. Kliefoth, Deputy. Filed in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, the 9th day of September, 1913. Jos. Murray, Clerk. By E. M. Daggett, Deputy.

92 5206.

In 57th District Court.

No. B-3488.

WILLIAM WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

Statement of Facts.

Tried April, 1913.

Original.

Filed August 30, 1913. Andres Coy, Jr., District Clerk Bexar County, Texas.

Filed in the Court of Civil Appeals at San Antonio, Texas, Sept. 9, 1913. Jos. Murray, Clerk.

93 In District Court, 57th Judicial District, Bexar County, Texas.

No. B-3488.

WILLIAM WAGNER
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY.

Statement of Facts.

Be it remembered, That on this Wednesday, April 30, 1913, the above styled and numbered cause came on to be heard before the Honorable R. B. Minor, Judge of said Court, and a jury, and continued from day to day to its conclusion, during which time the following facts were adduced in evidence:

94 *Direct Evidence of the Plaintiff.*

The plaintiff, WILLIAM WAGNER, was called in his own behalf, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. SEHORN:

My name is William Wagner. I am the plaintiff in this case. In the month of October, 1911, I was working for the San Antonio & Aransas Pass Railway Company as a brakeman. On the 18th of October, 1911, I was hurt.

As to how I happened to get hurt, why, I came out on the local out of Yoakum, and I came to Kenedy, and I had some switching to do and we throwed two cars, emergency, out of the house track and throwed them down on the main line; I came out of the house track on the hind end footboard, on the footboard of the engine, to couple in these two cars, and the coupling wouldn't make; I coupled up against them, but it wouldn't make. I slacked the engineer ahead and closed the knuckle and dropped the pin with my hand, on the box car; and I gave the engineer a back-up signal to couple in again, and I got back on the footboard of the engine; when I got on the footboard I looked down and I seen the drawhead on the engine was shifted way over to my side, and I reached up with my left foot to shift the drawhead over so it would couple,
95 and my right foot slipped on the wet footboard, and I reached back for a hand hold on the hind end of the engine with both hands, and I hurt my back, and this foot went in the drawhead. (Indicating left foot.) When I took the engine up to couple on to those two cars the coupling wouldn't make, because it must not have hit square, because the pin wouldn't drop. The coupler could not have been in proper condition, it ought to have been automatic; they are supposed to couple without a man going in between to couple them with his hands or feet, or having anything at all to do with the coupling. After I saw the coupling did not make, I slacked the engineer ahead and I then closed the knuckle and dropped the pin—I did that because I had to drop the pin, I shook the pin with my hand and the pin dropped—lug—it wouldn't drop before; the pin had to drop in order for the coupling to make on the car. The pin on the coupling end of the engine was all right, it dropped. I don't know what kind of a drawhead it was, but it was an inside pin in the drawhead, I am pretty sure it was. I was on the footboard of the engine, on the hind end, when I discovered that the drawhead was way to one side; I was about three or four feet from the car.

Q. Well, did you have time to stop then and——

A. Well, he came back right fast, you know, and I didn't have time to do nothing.

If I had not shoved that drawhead over, it would have slipped by and probably have mashed me through here. (Indicating hips.)

I was following the engine of this train, my proper place was on the footboard in the direction of where the coupling should be made.

When I caught my left foot in the drawhead I don't remember whether I fell or what happened to me; I dropped down after
96 they flagged the engine away from there, you know, why, I got down on one foot, and then another man, Mr. Gillespie, helped me off to the side. At the time my right foot slipped I was hanging on the hind end of the engine with both hands—I was down on my knees partially, hanging there, held up, holding my foot up on the footboard; if I hadn't I would have slipped under the engine.

I don't remember whether I struck my body or not when I fell back; I could have struck my head, but I don't remember. My foot caught in that coupling, between the engine and the box car, and it mashed the toe of my foot.

(At the request of counsel, the witness took off his shoe and showed his left foot to the jury.)

After the accident they took me in the baggage room on a cot, and they gave me a hypodermic and dressed my foot and put me on the passenger train and sent me to the hospital.

When I first went to the hospital, why, Dr. Graves sewed the toes up, gave me chloroform and sewed the toes up; and the second time he took off three toes, twelve days after; and the third time he gave me chloroform and took off a piece of toe down to this joint, this last toe. (Indicating). And then I went home and stayed home about a week or two, and then the bone came out of the end and he had to take that off, he took off that joint then, and I stayed in the hospital eight days; and then I went home again and he came back—this here joint formed a pus, and he came back and wanted to take out a bone in the foot, up in here, (indicating,) from here to here, and I kinder talked to him about a flax-seed meal poultice, and I suggested flaxseed meal poultice, and we drawed the pus out and it never came back.

I can't walk on the outside of that foot, I can walk on the big toe, but that is about all—it is too tender, and the bone protrudes out here, there is nothing but the skin over this bone. (Indicating). There is no cushion there.

97 I was not hurt in any other way; I am only cross-eyed from it—I can see with the eye, but then I see two subjects. I was never that way before, before I was hurt.

I use crutches because I am hurt in the back; I am hurt right across my hips, right above my hip, all the way across.

I don't rest very well at night; sometimes I get a kind of spell that comes on me, that starts in my hand, I get too hot—I am laying still in bed and I get all hot here (indicating), and the spell comes up into my arms, and my hands are paralyzed, and it comes in the legs while I am laying in bed; I don't know what it is. I get tongue-tied, too, it goes to my tongue, my tongue gets thick, and I can't say what I want to say—my mouth, my lips, get thick

and my tongue gets thick and I can't talk. I never was affected that way before I was hurt. I did not see double before I was hurt.

When this thing happened I was twenty-nine. I had been working for the San Antonio & Aransas Pass Railway Company about thirteen months. My earnings averaged about $100.00 a month.

I never had any trouble with my back before I was hurt on this occasion; I never was hurt by a railroad. I had been a brakeman altogether about eight years.

It was absolutely necessary to shove that drawhead over there to make the coupling. When the cars went together the first time they did not couple automatically by impact. When those couplers are in proper condition they are supposed to couple without a man coming in between them or touching them.

Cross-examination.

Mr. BOYLE:

98 I kicked the drawbar of the locomotive to shove it over; it was swung over to my side; I was on the left hand side of the drawbar and it was swung over my way. The drawbar was out of line and wouldn't couple, and the reason in my opinion why it would not couple was it was swung out over this way (indicating). I couldn't find out whether there was anything else the matter with it—I couldn't find nothing. When I kicked that drawbar I kicked it for the purpose of lining it up with the drawbar of the car, that was the only reason I kicked it.

When I came back to make the first coupling the knuckle pin on the car didn't drop. That is the pin that, after they come together, drops down and locks; if the pin doesn't drop down and lock, then we have got no coupling. When this knuckle pin failed to drop I then gave the engineer the signal to slack ahead. I didn't do anything at all to the drawhead of the box car before I gave the signal to slack ahead. When I gave the signal to slack ahead the engineer moved away from that box car with the engine just a little ways—moved about two or three feet away, then he stopped. I then stepped off the footboard and went down to fix this knuckle, closed the knuckle and dropped the pin with my hand—shook it a little and it fell down; I gave the engineer a back-up signal and got back on the footboard, and I seen the knuckle was shoved over to my side, shoved way over. I guess the engine and car then were just about eight or ten feet apart, the engineer stopped with the engine eight or ten feet from the box car; when the engine stopped I got down off the footboard and walked down to the coupling or drawhead on the box car and dropped the pin with my hand—closed the knuckle and dropped the pin; I then walked half way to the engine and gave the sign to back up.

99 Q. You did not look at the drawbar on the engine at all?
A. Well, I did not see the drawbar right then—I came up towards the engine and gave the back-up sign, he backed up before I got to the engine, and I got on the footboard, and I seen the drawhead was over this way (indicating), and I reached up with

my left foot to shove it, and when I did my right foot slipped on the footboard, and I reached back with both hands to grab the hand hold on the hind end of the engine, and hurt my back. When I reached to kick this coupler I had hold of a hand hold on the hind end of the engine with my right hand. When I got ready to shove it over I put my foot right out on the knuckle, right back of the knuckle of the drawhead to shove it over, and as I put the pressure on the draw head with my foot the other foot slipped.

(Counsel for defendant here introduced a model of a drawhead.)

This is the drawhead, and this here is a knuckle. (Indicating on model.) A long bar that goes back in the body of the car is the drawbar. Well, I set my foot right back of the two, right here (indicating), right about there, on the drawbar, that was on the knuckle's side—I put it on the knuckle side, I believe. The principle of this drawbar is the same bar as that on the engine, they have got a knuckle like this. The pin I was talking about was that lock pin that drops down to lock the knuckle. (Indicating pin in model.) When the pin drops down like that (referring to illustration by counsel) it is locked and the coupling is made, and when it doesn't drop down like that, why, you have got no coupling and they pull apart.

When the cars came together and I failed to make that coupling I didn't notice anything wrong with the coupler on the engine at all; it was all with the other. Now when they come together that way and do not make a coupling, sometimes that throws the drawbar out of line and sometimes doesn't; it hit center in the coupling and the knuckle closed all right, but the pin wouldn't drop. When I pulled away to make the second coupling I never noticed the drawbar of the engine at that time.

Before I made the first attempt at coupling I did not notice the drawhead of the engine—I just went down there and naturally supposed it would couple; I was riding on the footboard at that time; I did not look at that time to see whether the drawbar of the engine was straight or out of line, but it must have been straight or they wouldn't have come together, wouldn't have coupled—if out of line they wouldn't do it.

Q. Now, Mr. Wagner, there is a picture of a man standing on the footboard of the engine kicking the coupler—do you see it? (Showing picture to the witness.)

A. Yes, sir. I notice he is kicking a coupler on a car instead of an engine. When I undertook to kick this coupling I wasn't in that position, was not standing that way, I was standing with my hand over on the handhold—those engines have got a handhold right in there, crossways of the tank (indicating); I had hold of that handhold and was standing to one side, and I reached up with my left foot to shove it back, and when I did my right foot slipped and pulled me. The only difference between those positions is I was holding on to the handhold over on that side (illustrating), I had hold of that timber and had hold of the handhold with my right hand—in other words, the handhold was on this beam here (indi-

cating), and my right hand was up here on this handhold,
101 and I was kicking the coupler of the drawhead of the engine instead of the coupler of the drawhead of the car at the time of the accident.

When I got on the footboard I was facing the engine, and then after I got on the footboard I turned and looked at the coupling and saw the coupling shoved over to my side, and then reached with my left foot to shove this drawbar over. I didn't stand on the corner of the footboard, I got on the footboard with my foot over on the inside of the rail, I was astraddle, and when I got on the footboard I was pretty near right against the drawbar of the engine, and I reached up with my foot to shove it over and my right foot, the one on the footboard, slipped; wet and grease on the footboard caused my foot to slip. I had been running on that engine for, I believe it was, two or three months. As to how long the footboard of the tender had been wet and greasy, well, the fireman always leaves the top there open on the tank, and the oil sloshes over, and the oil gets in the water and comes down on the hind end of the tank when they couple on to a car—sloshes over, and the footboard was wet and greasy all the time; I knew the footboard was wet and greasy when I undertook to make this coupling. The condition of that footboard is what caused me to slip.

I stated that if I had not reached up there to kick this drawhead on this engine that the drawhead might have slipped by the drawbar on the car and I would have been mashed in between them—I say that the drawbar might have slipped by and come over here (indicating) through my stomach.

I don't know how wide the couplers are through the jaws there on a box car or on a locomotive.

I was brought from Kenedy to the hospital here on a passenger train. My foot was operated on several times; they were
102 trying to save as much of my foot as they could.

Dr. Graves treated me here in the hospital, no other doctor treated me at the hospital. Dr. Graves treated me there as long as I was there, he performed all these operations on my foot. The old Dr. Graves didn't do nothing, but young Doctor did—the young Doctor assisted from the first operation—that is, the first time he ever sewed the toes up.

I complained to Dr. Graves that I had been injured in the back. I told him when I got to getting up in a rolling chair that my back was hurting me; that was about thirty or thirty-five days after the accident. That was the first time I complained about my back—I was laying on my back all the time after I had the toes cut off. Dr. Graves gave me some liniment for my back and told the nurse to rub me twice a day. I did not have to tell the nurse over there that I was injured in the back. They treated my back. No other physician besides Dr. Graves treated me while I was in the hospital. Dr. Oglesby has treated me since, he came out to see me during one of the spells; that was just about a month or two months ago. No other doctor treated me; Dr. Taylor and Dr. Burg were out there

and examined me, and Walthall and Venable, they came out to examine me.

This accident happened in October, 1911, and I was under Dr. Graves' treatment about sixty-three days.

Redirect examination.

By Mr. SEHORN:

After I went home I was down in bed about two months; I was in bed two months the last time; I think I stayed in the
103 hospital fifty-three days the first time, I believe, when I first went home.

Since I sustained this injury I have done no work whatever, because I am not able to.

The footboard is a board built on the hind end of the engine for the men to use, the head brakemen, they use it for doing their work. I was standing in the proper place.

If the coupler of the engine had been in proper position and had struck the coupler on the car in the proper way, the coupling should have been made by the jaws coming together and the pin dropping; not doing that, it indicated that the coupling was not in the proper condition. I didn't couple the first time I tried, nor the second time.

Recross-examination.

By Mr. BOYLE:

I never did measure the distance from the bumper post the drawbar extends—I don't know whether it is a foot or two feet or twelve inches or twenty-four inches or thirty-six inches—I don't know how far. I don't know how far out from the bumper post on the tank of the locomotive the drawbar of the tank extends, I don't know if it extends further out from the body of the tank than the drawhead extends from the box car or not—I don't know whether that extends out a foot or two feet or three feet.

When I came back the first time to make this coupling the only reason that the coupling did not make was that the pin on the box car did not drop to lock the coupling. The jaws of the drawhead of the locomotive come in like this (illustrating) and fit in
104 there, so if this jaw had dropped there would have been a coupling—it was bound to have been when I came back the first time, the drawhead on the engine was in line with the drawhead on the box car, that was bound to have been the case, because if it had not been the case the cars wouldn't have come together like they did—so that the only thing that prevented the coupling the first time was the failure of the pin on the box car to drop. The couplings did not slip by each other and I did not get mashed between the cars the first time they came together.

Redirect examination.

By Mr. SEHORN.

When the coupling apparatus of these automatic couplers are in proper condition and they are properly connected, they couple by impact automatically; I have seen them do it, I have seen cars with one in O. K. condition couple all the time.

When the brakeman couples a car he pulls a lever on the outside of the car, that opens the knuckle—that raises the pin and opens the coupler up, then all he has to do is to give a signal and they back right up. He has nothing to do with reference to fixing the knuckle or anything of that sort.

Recross-examination.

By Mr. BOYLE:

Before this time I had failed to make couplings because the couplers were not in line with each other and I have shoved them over before I got to them—I would have to make a guess
105 as to whether they were going to couple or not; I had done that once or twice before that, that is all I remember of.

(Witness excused.)

The plaintiff called Dr. S. BURG, who was first duly sworn by the clerk and who testified as follows:

Direct examination.

By Mr. SEHORN:

My name is S. Burg. I am a physician and surgeon. I know the plaintiff, William Wagner; I have had occasion to see him and to examine him to ascertain his physical condition.

On examination of this man I found the following conditions: First, on the left foot he had four toes off—that is four toes except the big toe—metacarpal, or metatarsus, would rather call it, from the second toe—from the big toe, part of that bone was sticking out through the skin, protruding, and this protruding part of the toe was very painful to the touch. That foot is not in a condition so that the man could walk on it normally, he can hardly walk, especially since the toes are so essential to firm steps in walk-
106 ing. Where the bone protrudes there is so far no further cushion except the skin; the parts of the skin and the underlying tissues are also very thin, and especially that part of the protruding bone, it is likely to be bruised by every kind of clothing, either stockings or shoes, is certainly constantly going to give trouble in walking, that will make walking very painful.

On general examination of his body I found, first of all, that his eyes are not looking in a normal condition—for instance, he has got one eye, the left eye, turned to the outside—strabismus, as we call it—so he cannot concentrate his eyes to the proper vision; it is essential for proper seeing we exercise both eyes and concentrate

to a certain point, then you can see normally; if there is any trouble with that, you usually see double or usually don't see distinctly. Then there was some peculiarity about his speech—his speech was to some extent not in a cohesive way, like normal, but in a hesitating way. Then there was some abnormality about his sensations and his feelings all over the body, especially in the lower limbs; extreme painfulness of the whole spine, the whole length—not regular, not indicating any special localization or degeneration of tissues, but quite irregular, one time it would be very exaggerated and at other times it would be less exaggerated, or perfectly normal; and these reflexes, as we call them, these different reactions in feeling, they are especially abnormal in the lower limbs, and to such an extent that sometimes he would not feel any prick of a needle through the skin, or deep into the skin, and at other times again he would react with the slightest provocation. Altogether his position of walking was as far as I could see abnormal, he could not walk without support, he cannot hold himself entirely erect, and he would use his limbs, not like a man with locomotor ataxia,
but you could see he could hardly use them in a normal
107 way—he would put them straight forward and not let the
weight of the body rest especially on that left leg. That is all, as far as I can remember, that I found on general examination.

I have examined Wagner twice.

The injury to the foot is permanent, those toes won't grow back. In my opinion that man suffers from concussion of the spinal column and spinal cord, with all that strain of nervous symptoms, with such a string of symptoms that will cause a man to be an invalid for possibly his life time. His condition is such as would affect his ability to labor and do ordinary work, under the conditions.

Cross-examination.

By Mr. BOYLE:

I examined Mr. Wagner the first time on the 4th of February of this year, 1913. I examined him again on February 13th of this year, together with some other gentlemen. I haven't examined him any other times.

Concussion of the spine, which in my opinion this man is suffering from, at the time it occurs naturally will cause pain, especially on that place—the effect of the external force. Later on the symptoms would be in other directions. Sometimes, immediately following the concussion there would be pain there suffered as a result of the blow to the spine—possibly at the time of the happening the sensations may be so dulled that he has not possibly any pain following it, but in the course of time these symptoms will show up, and pain will especially show up—as to how long a time that is depends, there is no stipulated time—sometimes it may be a month
or two months, sometimes a few weeks—sometimes pain
108 will appear a few days after the happening and sometimes at
the time of the happening; it is impossible to fix the maxi-

mum time in which the pain will appear, because that is something that is different with different individuals and different circumstances, depending on the kind of force that is acting or on circumstances, that is beyond our power to calculate it; I would not fix the period of time in which a man would show signs of pain or other symptoms of this concussion, it is impossible to fix any time, because it is different times in different cases. It is not likely it would take such a long time as two years to show up, not likely that it would take a year or six months; I would judge that symptoms of pain and all these different symptoms I have recounted, I should judge would be pretty likely to appear in a few weeks after the happening—it would be a very unusual case if they did not appear in a few weeks. In my experience as a physician, I don't recollect that I ever had such an experience where in a case of this kind the pain and other symptoms did not appear for six months or a year or two years, don't recollect any case of that kind in my practice.

As I say, there is a complete absence sometimes of the sense of feeling in the lower limbs, and at other times the sense of feeling is very acute there, very exaggerated, very abnormal. He has not got any of the impediments such as result from locomotor ataxia, because he has no locomotor ataxia. He appears to have difficulty in walking on his feet, that is particularly with reference to the left foot and that is not exactly on account of the condition of the foot, not entirely for that reason alone: It is also for the special reason, I expect, possibly, that the twist that he obtained very likely acted more on that side. The reflex symptoms on the left side are more irregular, more exaggerated on the left side than on
109 the right side; but they are on both sides.

When I made my examination of Mr. Wagner I stripped him absolutely naked, covered his face and his eyes so he couldn't see anything, absolutely nothing, and then by way of a needle examined the different localities and watched the readiness as to sensitiveness, as to painfulness, as to quickness of reaction when pain appeared, whether retarded or quickened; and I examined by knocking on the different tendons, different reflexes; I examined him then standing, all along his spinal column in regard to painfulness, and examined him also in regard to his walk, lifting one leg and then the other, had him to walk, to make different movements, bending and stretching a muscle under conditions where his attention was called to something else, turned off of the examination by having somebody to talk to him, ask him questions and all, and during this time I would try these different tests of the reflexes; and in that way I came to that opinion. The objective symptoms that I found were these irregular reflexes. That is one of the most important, simplest signs of abnormality. Then I found this strabismus in the eye; and then I found also—which I didn't mention before—a heart action that was giving 110—or 108 to 110 beats to the minute regularly, quickened heart action.

Q. Don't you very frequently find a quickened heart action when you are examining a patient that has no evidence of heart injury?

A. Well, not entirely—he may have some excitement in the beginning, but you can recognize this, as it is only momentary excitement of the heart, caused by some physical effect, by the fact that it is going away pretty soon; but the examination lasted from half an hour to three quarters of an hour, and during all that time and after he was laying flat on a couch and all and had
110 no excitement whatever, and after he had naturally accustomed himself to the condition, we still found that same number of heart beats; therefore, I believe that it is not only brought about by the temporary excitement of the examination. I have stated that at the two examinations I made of Mr. Wagner, each time I found at one time an exaggeration of the reflexes, whereas possibly a few minutes later it would react in the opposite way. At each examination during the course of the examination I would find that at one time I could stick a pin in him and he would not feel it, and then a few minutes later if you stuck a pin into him he would show more pain than an ordinary person would show or more than a normal person. That change would occur in the course of fifteen or twenty minutes or half an hour.

(Witness excused.)

The plaintiff thereupon called Dr. C. W. TAYLOR, who was first duly sworn by the Court, and who testified as follows:

Direct examination.

By Mr. SEHORN:

My name is Dr. C. W. Taylor. I am a physician and surgeon. I know William Wagner, the plaintiff in this case. I have had occasion to examine him to ascertain his physical condition.
111 The first time I examined him was on the 4th of February of this year, and, of course, the most conspicuous injury was the left four toes—or the four toes off the left foot, they were gone; and the next condition that was manifest was the condition of his heart: He was running a pulse at that time of 108, which is quite a great deal above the normal pulse rate; and on examining him for the nervous reflexes, the spine, why, on the two examinations I made they differed—usually, however, they were about what we call an exaggerated reflex, the reflexes were all too active. And then I noticed particularly about the left eye: He has what we call an external strabismus—that is, the eye, instead of pointing on a line, diverged or turned out—in other words, a cross eye, turned out; and the man has an impediment in his speech, and complained at that time when I questioned him about his impediment of speech that his tongue got thick and felt dead, that he didn't seem to have the ability to talk—he knew what he wanted to say, but he couldn't tell it, his tongue kind of thickened up and he didn't have the power and ability to enunciate, to pronuonce the words that he wanted to say—he knew just what he wanted to say, but he couldn't say it.

With reference to his foot and his ability to walk on the foot in

a normal manner, now, there is one marked feature about that foot: Now, in all amputations of extremities, of course, the ideal condition is to get the bone or prominent parts padded out, so that there is no friction against them. Now, in this man the joint, the metatarsal bone here of the lesser toe, the small toe, that bone is right square under the skin, every bit of friction there is just like pinching that piece of skin right between two hard surfaces—in other words, there is no padding over the head of that bone. That is a very painful condition to start with, and renders the man
112 practically incapable — walking on that foot.

Eliminating the injuries to his foot, with reference to my prognosc*is* as to the other injuries about which I have testified, I will state that in my opinion the man has what we term a "traumatic spine", his whole nervous system is shocked, and the outcome of these cases is always problematical—always problematical—some of them improve, but no man can say definitely that any of them will improve. I should consider his condition one of permanent injury.

With reference to the effect his condition has upon his ability to labor and do any kind of work that a man can do, I will state, of course, that always depends on the character of work that man is doing: Now as far as manual labor is concerned, he is handicapped right from th tart with his foot; and as to almost anything he is very seriously handicapped by the condition of his nervous system.

Cross-examination.

By Mr. BOYLE:

I don't testify in a great many of these cases; I testify in a number of them. I testified in the case of L. S. Spencer against the San Antonio & Aransas Pass Railway Company, that has been some six or seven years ago, I believe—I don't remember just how long.

Q. You testified in that case that Mr. Spencer was permanently and hopelessly disabled, didn't you?

A. Well, I consider to-day that Spencer is practically disabled as far as the general nervous system is concerned.

Q. Well, you answer my question, Doctor: Didn't you
113 testify in the Spencer case that Spencer was hopelessly and permanently disabled?

A. Yes, I think I did.

Q. Yes, sir. Don't you know that Spencer is now in the service of the San Antonio Fire Department as a fireman?

A. I don't know what he is doing. I have seen him on the street. He does not use any crutches now or any walking cane, I believe not, when I have seen him. I think he was on crutches at the time of the trial. As to whether I testified that in my opinion he would not be able to walk any more, I don't know as I testified as to that specific question. I don't remember that; I testified that Mr. Spencer's case was a case of sensory and motor paralysis about the lower limbs and that his condition was permanent—I won't say now that I testified to that specific question. I don't remember whether I did or not, but in the generalities of the case I considered that he was perma-

nently injured; and I don't think he is worth much now. I did not think that Mr. Spencer, from the condition that I described him to be in at the time of the trial, would ever be able to engage in wrestling matches—I never would have thought so.

Q. Well, now Doctor, if you should learn now that Mr. Spencer has engaged in a wrestling match in the last year or two, you would be bound to say that you were totally mistaken in your opinion in that case, wouldn't you?

A. If Mr. Spencer from the condition that I saw him at that time, from the examination I made, if he engaged in wrestling matches I certainly should conclude that I must have been mistaken. I very frankly state so.

Q. And then if he is able to perform the duties of a fireman of the Fire Department of San Antonio, would you say that you
114 were mistaken in your opinion in that case?

A. Why, if he is able to scale a ladder and perform the acrobatic feats *of* some of these firemen do, why, that would be against my opinion at that time, and I state without remembering specifically any positive individual condition, that his condition at the time I saw him certainly was against any permanent recovery from his condition, and from what I have seen of him on the street, and I have talked with him several times afterwards, I consider that his nervous condition at least is way below par. I haven't talked with Spencer within the last year or two; I have seen him at a distance at other times.

I testified in the case of Mrs. McDavitt against the San Antonio & Aransas Pass Railway Company; I testified that Mrs. McDavitt was a nervous neurasthenic—and she is, I certainly do still contend that she is, and for the simple fact that that woman happened to become pregnant and had a baby, does not weaken the condition at all. Mrs. McDavitt is very seriously injured as a consequence of that, I know, because I have known of the treatment of her case since her case was settled. I knew Mrs. McDavitt's physical condition before she was ever brought to me after having been injured, and I knew her physical condition, that at that time she was a good, strong, healthy young woman, and I am positive in my statement that when I examined her afterwards that she did have a prolapsus and that her nervous system was very badly shattered to the extent that she had attacks of night terror, she would wake up, and just seemed to be a case of genuine night terrors, frightened all out of her sleep, it was a neurotic condition, and I know that not only from my own examination, but from consultation with Dr. Minnie O'Brien: and I saw her from time to time and I know that was her condition positively.

(Witness excused.)

115 Plaintiff rested.

Direct Evidence of the Defendant.

The defendant called H. C. MOORE, who was first duly sworn by the clerk and who testified as follows:

Direct examination.

By Mr. BOYLE:

My name is H. C. Moore. I am a locomotive engineer with the San Antonio & Aransas Pass Railway. In October, 1911, I was engineer on the San Antonio & Aransas Pass.

I remember the occurrence of the accident when Mr. William Wagner got his foot mashed. We were switching at Kenedy. I was engineer of the train, and we pulled up to the house track, got the cars out of the house track and kicked them out on to the main line and went to couple the engine on—had two cars we had switched out of the house track, and went to couple the engine on to a car, and the first time it didn't make the coupling, missed the coupling, and then came out and slacked—he gave me a signal to slack ahead, I slacked ahead a few feet and he gave a stop signal, I stopped until he got ready and then he gave a signal to come back, and then as I backed up to couple on he said put his foot against the drawhead—I couldn't see him, because he was on the foot-board, behind the tank—after he gave the signal he was on the footboard and gave
the signal to back back, and he said he put his foot on the
116 footboard to shove the knuckle and said the drawhead caught
him, said his foot slipped and the drawhead caught his foot. The number of my engine was 205. Wagner was working on the side that I was working on, the right side, engineer's side. I was getting my signals from Wagner. The first time we went back we missed the coupling, didn't make it, and I got a signal from Wagner to slack ahead, I went ahead with the engine about four or five feet, I suppose. I don't know if Wagner did anything to the coupling apparatus on the box car; you see, I was on the engine when he gave the signal to go ahead and stop, and I stopped and he went in between them and I couldn't see him—he went in between the engine and the car, and I couldn't see what he was doing; and then when he came out he gave the signal to slack ahead, he got up on the footboard and I couldn't see him any more; but he said he went to shove the knuckle with his foot and his foot slipped and caught in the drawhead; still, we didn't move the car at all. When we failed to make the coupling the first time, I moved the engine four or five feet away from the box car and it was then Wagner went in between the cars and I did not see him until he came out and gave a signal to back up. When I backed up I didn't back up fast, didn't move the car even, didn't hit it hard enough to move it, I came back slow; when we came back to make that second coupling it was just three or four feet and we came back slow, backing.

Q. Now, Mr. Moore, did he say he was kicking the knuckle, or the drawhead?

A. Why, I don't remember just what he—I think he said he was shoving the knuckle with his foot and his foot slipped in between them as they came together.

The coupling apparatus of engine 205 is one of those automatic couplers—I don't remember some of them, they have different couplers, some of them have a different brand, and this was, as near as I can remember, it was a Power coupler. That is an auto-
117 matic coupler model there. (Referring to model in evidence.) And the drawbar is the bar that goes back under the car. The construction of the drawbar on this particular engine 205 is on this style, the coupler and the drawbar—the drawbar is put on the same as this, with a band around it, they call that band carry-arm. I looked at this coupler that particular day and couldn't see anything wrong with it. Where we were endeavoring to make this coupling it was straight track, it was about a car length from the point of that Corpus main switch, we were headed this way and coupling on to the west end of the car, the east end of the car was just near the Corpus end of the switch; the grade there is just about level.

(In answer to questions by the Court:)
We were coupling on to the main track.

(Cross-examination waived and witness excused.)

The defendant thereupon called C. F. Brooks, who was first duly sworn by the Court and who testified as follows:

Direct examination.

By Mr. Boyle:

My name is C. F. Brooks. I am a conductor on the Sap. Was Conductor in October, 1911, on the Sap—I mean, the San Antonio & Aransas Pass Railway Company.

118 I remember the occurrence when William Wagner, the plaintiff in this suit, had his foot mashed. I was conductor of that train. At the time the accident occurred I was at the depot, which is, I should judge, about one hundred yards from where the accident occurred—about that, more or less. I did not see the accident at all.

I have been in the railroad service altogether about eighteen years, have performed the duties of braking, running trains and firing. In my experience as brakeman and conductor I have had experience with these automatic couplers these cars are equipped with.

I don't know how far the jaws of the coupler is across, how wide, but twelve or fourteen inches is about as near as I can judge, but I am not positive, though. I don't ever remember seeing *to* drawheads slip by each other where we were undertaking to couple them and not mate.

I asked Mr. Wagner at that time how the accident happened,

he told me he attempted to shove the drawbar or the knuckle with his foot, his foot slipped, that is the way I understood him.

I did not make any examination of the drawbar of the locomotive after this accident, because there was a car inspector there, right there at Kenedy, and he was in better fix for making this examination than I.

(Witness excused.)

The Court thereupon adjourned, to reconvene the following morning at nine o'clock.

119 THURSDAY, May 1, 1913.

Court reconvened at 9 o'clock, A. M.

The defendant called O. A. MUDD, who was first duly sworn by the Court and who testified as follows:

Direct examination.

By Mr. BOYLE:

My name is O. A. Mudd. I am car inspector for the San Antonio & Aransas Pass Railway Company. I was car inspector for the same road in October, 1911, employed at that time at Kenedy.

I remember the occurrence of an accident in which William Wagner had his foot mashed down there. I inspected the car and equipment that was involved in that accident, I inspected it on the 8th day of October, after this accident; I inspected it clean over—took the measurements, and everything, the heads and standards and couplings; I inspected the couplings at both ends of the car. I did not make any inspection of the coupling apparatus of the engine. We used an engine out of the roundhouse when we were making these examinations of the car. The conditions of the coupling apparatus were all good, stood up to the standard, the standards were all stood up to the safety appliance standard, the couplings were standing 33 inches from the top of the rail, with about a two inch lateral. At the time I inspected the car, the engine, 205 was somewhere between Kenedy and San Antonio.

Cross-examination.

120 By Mr. SEHORN:

These couplers are made to couple automatically by impact—they are supposed to be in such condition as that, so when they come together they will couple without the necessity of men going in between the cars to couple or uncouple, and should be in that condition. If they do not couple with the automatic impact, they are not in proper condition.

Redirect examination.

By Mr. BOYLE:

In the case of a cocked knuckle I have found it necessary to adjust a coupler in good condition before it would couple.

(Witness excused.)

The defendant called Dr. AMOS GRAVES, who was first duly sworn by the Court and who testified as follows:

Direct examination.

By Mr. STOREY:

My name is Dr. Amos Graves. I reside in San Antonio. My profession is the practice of surgery and medicine. I have practiced twenty-one years here in San Antonio.

On or about October 18, 1911, I was called to see the plaintiff in this case, Mr. William Wagner; I found him at the Santa
121 Rosa Hospital here in San Antonio.

With reference to what injuries I found, well, I found one foot, I believe it was the left—anyhow, one foot, the toes pretty badly crushed, and one foot with exception of the large toe—the four small toes pretty badly crushed, they were subsequently amputated; and just above the toes there was a lacerated wound, just below the instep and to the outer side of the instep; that wound was stitched up, and a few days afterwards—I don't remember just how many days—the four smaller toes were amputated—they turned gangrenous and we took them off, and I tried to save one of the four badly injured toes, I tried to save one and then just half of it, but finally had to take it off and take out part of the bone just a little back of the toe, which left his foot with one toe, took a little portion of the bone out of the bottom of the foot where it joins the toe. Wagner was under my care four or five months. I have given the jury the statement of all the injuries I found on his body. There were no objective symptoms of any other injuries, he did not complain of any injury, excepting, maybe, several weeks after his foot was injured he told me one day he had a little pain in his back. That pain was not necessarily caused from any injury to the spine. He put his hand back like anyone would with lumbago, on his back there, Judge; I don't remember if he made any specific note of any special point.

Q. What is the most probable cause of that pain after he has been in bed that long?

A. Well, it is what we call in the back, what we call lumbago.

Q. Now, doctor, was there any evidence during the whole time you had him in charge of any injury to the spine that was caused by wound or caused by shock when his foot was hurt?

A. Well, Judge, the only injury I discovered and looked
122 into was the injury to the foot, because that was the only injury he had. This condition of the back and his complaining of his back and all the complaints he made to me of his back during all the time I had him in charge was not such an injury as to account for his now claiming to have lost part of the use of his tongue, or at times the use of his tongue and the focus of his eyes and the partial loss of control of the motion of his limbs at this time; an injury to the spine, the symptoms are immediate. If these conditions that are claimed now could have been caused by any injury to the spine that had occurred at that time, it would have been felt at the time—any injury of sufficient character to pro-

duce symptoms of paralysis would have been felt at the time and would have been recorded by me as the most grave symptoms; but I did not consider any injury except his foot injury, because that was the only injury I could see by symptoms and examination.

When Wagner complained of his back I made an examination to see whether there was a contusion or a bruise: there was no evidence of injury to his back, no evidence of any bruise there.

As to when I saw him last, I would have to estimate that—I believe he was under my care, I would have to say approximately, because I do not know exactly. I saw him after he left the hospital, it may have been, say six months after the date of the injury, the date of the injury being October 19th., it may have been about six months afterwards that I saw him; that is just approximately.

At the time I saw him there was not any injury to the spine and he did not complain of any injury to his spine at that time. He walked on crutches and walked on one leg with his crutches. If there was any spinal injury, if there had been any injuries to produce paralysis or symptoms of partial paralysis, it would have been very difficult for him to walk on crutches, because paralysis of the spine produces ordinarily weakness of the motive power.

123 His foot, Judge, was what I was anxious about, to see that he got the best skill that we could give him and the most carefully surgery and the best brain work which it was possible to obtain for him to save as much of his foot as we possibly could.

In explanation of the surgical operation being made necessary by reason of the gangrenous condition, I will state that during the first two or three weeks the three ourter toes were taken off, and the toe next to the great toe I tried to save half of that toe—I first tried to save all of it, and I saw that half of it would have to come off, so I clipped off the half and that left his great toe and just one-half of the toe next to the great toe; but it didn't repair like I wanted it to, so I trimmed the toe off completely; we took off four toes completely and left a lacerated wound on top of his foot, which was healing; but even after that about the third operation, I judge, on that toe I didn't take off the bone did not repair nicely and I had to take off about practically a third or fourth of an inch of the bone, I had to take it out—I had to take out a part about that long (indicating), about an inch out of the foot before it would completely repair. It became necessary to amputate at different times, because I had to save as much of that foot as we could; you see, if I had amputated right at first, of course, he would have gotten well more promptly, but I was trying to save that bone. When I found I could not save the bone, it became necessary to amputate because the margin of the bone became a little gangrenous and pus came out of it, that made it a dangerous condition, it was necessary for me to perform that part of the operation because the bone did not repair quickly, showing there was dead bone in it that had to be clipped out, had to come out.

I don't remember that Wagner complained to me more than once about the pain in his back or back-ache—he may have com-

plained once or twice. I think I gave him liniment for it.
124 There was no complaint about his back the last time I saw him at all; in fact, I didn't believe that his back was injured from his expressions to me. We were anxious about his foot, to get as good a foot as we could. During the six months that he was under my charge I found no evidence of any spinal injury. If the condition he claims to be in now was caused from spinal injury in would have shown immediately, in spinal injury, the symptoms are immediate.

Cross-examination.

By Mr. SEHORN:

I am the surgeon of the defendant.

Q. And have been for a number of years—ever since you have been practicing medicine, have you not?

A. I believe the Aransas Pass has had a hospital about eighteen years.

Q. Yes. Well haven't you been one of their surgeons about all the time you have been practicing medicine?

A. About nineteen years. At that time I had a great many cases under my charge.

I was immediately concerned with trying to save as much of Mr. Wagner's foot as I could.

I did not notice that one of his eyes is not in apposition, does not focus right.

(The witness was requested by counsel for plaintiff to go back and look at the plaintiff's eyes, and after doing so the witness said:)

Judge, I don't see anything abnormal about his eyes by
125 that examination. I notice he does not focus right, but he can turn his eyeball out in a way, he can turn his eye ball out a little more than necessary; it is a fact his left eye turns out this way, diverges—but, Judge, can't anybody turn the left eye out? I didn't see anything wrong or the matter with his eye, Judge, there is no divergence of the left eye except what is under his control, he controls that, that is controlled by that muscle, and if that eye diverges that is done voluntarily, when he wants to do it.

When Wagner told me he had a pain in his back I dismissed that without any significance; I didn't see any evidence of injury to the back at the time. When you have a very severe injury to the back, you will have external evidence by loss of motive power—that is loss of power and sensation, without any external evidence—you can have it without any external evidence, but he didn't have any loss or power or sensation. As a matter of fact, a man may have severe injury to the spine without having any external evidence of injury—I know that myself.

I had Wagner under my control about six months. As to whether I regarded his foot as in a serious condition, well, I was satisfied after I had gotten through, after his foot had healed, that he would have a good foot to walk on. I regarded his foot as in a serious con-

dition during the time I was treating him; it took me six months to effect a cure.

(Witness excused.)

The defendant recalled H. C. MOORE, who, being still under oath, testified as follows:

126 Redirect examination.

By Mr. BOYLE:

There were not any repairs made on the coupling apparatus of engine 205 after this accident at Kenedy, nothing made on it at all. I brought my train into San Antonio with that engine. Immediately after this accident I coupled that engine 205, onto the cars of this train, I did not have any trouble in making the coupling.

(Witness excused.)

The defendant called Dr. CHARLES S. VENABLE, who was first duly sworn by the clerk and who testified as follows:

Direct examination.

By Mr. BOYLE:

My name is Charles S. Venable. I am a physician and surgeon, living here in San Antonio.

I made an examination of the plaintiff, William Wagner, in February, 1913, in company with other physicians; the other physicians were Dr. Taylor, Dr. Burg and Dr. Walthall.

On that examination of the plaintiff I found an injury to the portions of the foot, or rather the lacerated injury to the
127 portions of the foot where he had lost a toe—the small toe on his foot—it was very tender, the end of the bone is very near the skin, and that is a tender point, doubtless painful whenever Mr. Wagner wears a shoe. That was the only positive finding that I could find, in view of the complaint. Mr. Wagner complained of suffering pain in his back, pain in his legs, loss of sensation in his legs, but the findings as to this loss of sensation did not correspond with the complaint that Mr. Wagner made—for example, Mr. Wagner permitted a pin to be stuck in this leg without flinching, without any apparent sign of feeling in that part at all; but when his attention was directed to the other leg the pin was pricked into the same point and he very perceptibly flinched, which did not exactly correspond in my mind—the very exquisite pain in his back of which he complained, very tender to the touch, you could barely touch it very lightly along the spine; however, from the distribution of the nerves in that region, that pain was not referred through the nerve trunks that left that region, as one would expect naturally, should the nerves at the origin, or orifice, of those trunks be injured; we also, if the roots of these trunks of the spinal cord were injured, we expect a wasting of the limbs below, which

was not present—what is known as the reflexes, that is the communication between the nerves lower down and into the spinal column and into the brain, these nerves carry impulses, and the impulse they carry is shown in what is known as reflexes; for instance, if you tap a man on the knee his foot jumps out like that (illustrating)—that is a reflex; there are other reflexes, other than the knee—that is a sample. His reflexes were exaggerated—got two actions from the reflexes, exhibited without a tap—if he was tapped the knee would come way up, but at the biggest tap, the third tap, the same thing was exhibited, so it was hard to figure just how
128 true that reflex response was. The same complaint was made in his hands, as far as feeling was concerned; a test was made as to the feeling in the outer sides of the hands, and in all sides of the hand, and the question as to whether or not he felt sensation at one point or two points at the same time, was raised—he expressed the view that there was one point only, but was able, on the other hand, to feel single points and other points. Now, those parts of the hand are distributed by two entirely different nerve trunks, and their communication to the brain is through these different nerve trunks, so there must be sensation in each, a separate sensation. Another evidence of the reflexes, insofar as the injury to the spine is concerned, is that a pin, or a small point, being put into his leg at the front of his thigh, while no pain was expressed, any sense of feeling denied, yet there was a reflex of the muscles, spasmodic, abdomical muscles, each time that was done, showing that there was not any inhibition of sensation. He has a squint in his left eye—he is cross-eyed, upward—upward squint, which I understand he doesn't know, or he told me he doesn't know, whether he got it in the accident or not; it is a congenital squint, he has had it always. If it was a squint from injury it would be due to paralysis, and under those circumstances he could not move his eyes in towards his nose, couldn't look across this way (indicating)—he could only look out in the direction of the squint. I think that is the substance of the examination. By "congenital squint", I mean born with it, or it came on shortly after birth. That squint could not be the result of paralysis, because if it was he could not move his eye at all.

I did not find any objective symptoms there at all of injury to his back. By "objective symptoms", I mean symptoms that I can find; the only symptom of injury to his back was what he said about it. From my examination and the conditions I found
129 as the result of my examination, in my opinion his complaints were not founded in fact, not by any objective symptoms. Before I made my examination of him Wagner told me what his complaints were, and I made examination of him for the purpose of ascertaining whether there was any evidence of these complaints that he made, and I did not find any evidence of his complaints, with exception of the injury to his foot. If his complaints were true, I would have found some very definite objective symptom on my examination, and I did not find any.

With reference to how many toes are off his foot entirely, I think

the little toe is removed, part of the metatarsal—that is, part of the second joint, and that, as well as I remember, I think it is the head of the portion of that that is left, that is near the skin and that is a sensitive point. I don't remember how many of his toes are altogether off.

Cross-examination.

By Mr. SEHORN:

The point was very sensitive on the foot, it inconveniences him very largely in walking and in the wearing of a shoe; he cannot get around like a normal man.

I said that Wagner was hyper-sensitive in the back, which means that his sensations are increased; by that we mean if you touch a person, or they touch you, you complain of them as touched—if you touch a man that is hyper-sensitive he complains of pain.

Exaggerated reflexes indicate an irritation in the spinal column, in the spinal cord. It means an injury of some sort, or disease, or something abnormal in the cord itself—therefore, you have
130 what is known as an exaggerated patella, that is the knee reflex; When you find anything like that that indicates there is irritation.

Q. Now, I think you testified on one side, on one leg, there was exquisite sensitiveness, and on the other he did not have any pain, or said he did not have any pain—is that true?

A. No, sir—I said both legs were the same, he claimed the same on both legs, I said that he complained about the loss of sensation in his leg, I think it was his right leg; he complained that he had lost sensation in his left leg, too, the same thing—complained to have lost sensation in both legs.

He permitted the pin to be stuck in his right leg without flinching, and then during the same proceeding with his left leg his right leg was stuck with the pen unexpectedly and he jerked it away—in other words, he didn't know what was coming. If the exaggerated reflexes existed that would not indicate something abnormal with the spine because the patella reflex is very misleading that way—but that is one of the symptoms we get, that is an objective symptom.

There is not any doubt that there is a divergence of the left eye, that it points out, does not point straight, anybody can see that.

Q. Now, Doctor, assume this hypothesis: If before he sustained his injury he could see normally, as a normal man should, and since that time he sees double, would not it indicate there was something the matter with his vision in some way, and this thing had come since the injury, wouldn't that indicate——

A. That would have nothing to do with his sight, Sir, nor with his seeing double—the eye pointed out that way would not
131 have a tendency to make him see double. His seeing double may be due to some condition inside of his eye, or some condition involving the lid to the eye, or motion—the optical nerve, or some condition of the optical region is concerned.

Yes, sir, I know Dr. Berrey. If you (Mr. Sehorn) were to tell me

that about two years ago you had a blood vessel, according to your physician, Dr. Berrey, burst in the head and paralyzed that nerve that controlled the muscle that drew the eye that way (referring to illustration by counsel) and during that time you could see with that eye, usually see two things at one time, I would think that rather extraordinary and that you had a paralysis.

Q. Yes, I did—I had paralysis of the muscle that pulled the eye this way. (Illustrating.)

A. I say, in this condition there is no evidence of paralysis. I don't know any reason why Mr. Wagner shouldn't see double—he may have something the matter with the inside of the eye. He could have something the matter with the optic nerve, yes, sir—not to see double, though—he could have something the matter with the optic nerve, he could have something the matter with the brain, cells leading to it. He could not have something the matter with the spine leading to that. An injury to the head could affect the sight.

There is no question about that divergence. If he does see double it is not a defect of the eye, he may have an injury to the brain nerve, or brain cells—that affects the sight.

Q. Well, that is what I mean—it is just the same to him whether the sight is affected, or the brain, the same proposition, the effect is the same?

A. Yes, sir.

132 When I went to see Mr. Wagner he was perfectly willing for me to examine him, he answered all my questions, was not reluctant in any way.

Physicians sometimes disagree about a prognoscis or a diagnosis, they disagree like all people do. Honest men disagree.

Redirect examination.

By Mr. BOYLE:

I did not disagree at the house with these Doctors there that had this man's case. I discussed it with Dr. Walthall and Dr. Taylor very briefly down town after we got back to town.

(Witness excused.)

The defendant called Dr. T. J. WALTHALL, who was first duly sworn by the clerk and who testified as follows:

Direct examination.

By Mr. BOYLE:

My name is T. J. Walthall, I am a physician and surgeon, practice here in San Antonio.

I remember examining the plaintiff in this case, William Wagner, in company with Drs. Venable, Burg and Taylor, in February of this year. I found on that examination that Wagner had lost four toes, I believe, on the left foot, and we found him rather a nervous man—but that was the only real injury we could find. I did

133 not find any evidences of a spine injury. The test we made to discover whether there was spine injury or not was putting

a dot over each spinal process of the spinal column and we made him move in different directions to see whether they all moved in perfect unison or not—and they did. We tested quite a number of the reflexes — the eye and the patella and abdominal reflexes. We found them normal, some of them slightly exaggerated at the time. The knee reflex was slightly exaggerated—that is called the patella reflex; I struck the patella reflex three or four times and it would be exaggerated, and then would go through the same motion like I was going to strike it again and would get the same reflex without touching it at all. There is no reason for that that I know of. It could occur with training, practicing. This reflex where I did not touch him at all could be caused by an anticipated blow, it would be voluntary, his doing it himself. The coordination was very good.

With reference to examination of sensation by touch in the upper and lower extremities, I will state that in the lower extremities we would touch the leg in different places at two points, and he would always say, one, he felt one on almost the anterior portion of the thigh and also leg. We touched some points that he claimed he did not have any feeling in the leg, we went over the whole leg—sometimes he claimed he did not feel anything, and other times when two points were touched he would say he would feel one, no matter whether it was over the same nerve trunks or not. That condition could not reasonably exist over the same nerve trunks, that he would feel the touch one time and not feel it the next. If you touch a nerve trunk and transmit it to the brain, you understand, with the nerve trunk in perfect order, if you only touched two points and he didn't flinch but from one that would indicate it wasn't a reasonable condition. If you touched the nerve trunk at one time and he indicated he felt it, and at another time he indicated he didn't feel it, that would not indicate pathology, and that was what I was after.

134 By pathology is meant disease to that part. I couldn't account for his feeling it one time and not the other.

Q. What I am trying to get at, Doctor, what would be—what would your discernment be there as a physician, whether there was anything the matter with him when you found that when you touched this nerve trunk at one time and he exhibited feeling, and at another time he did not exhibit feeling?

A. I would think there wasn't anything wrong with it.

On the whole from my examination I didn't think this man was suffering from a spine injury. I did not discover any objective symptoms whatever of spine injury.

I found a squint of the left eye when I examined him—we found a divergent squint of the left eye. I thought that was congenital. The eye condition that I found there, in my opinion, could not be the result of paralysis; I think that if it was due to injury it would be paralysis, either complete or partial, and if it was paralysis, it would not have shown the same symptoms that I found there—if it was paralysis he wouldn't have the same motion—he couldn't follow you about. If this man was suffering with a spine injury which caused a paralysis of his lower limbs and of his speech and of his

eye, I think from this examination that I made there I would have discovered some objective symptom of it.

I testified that his coordination was good, and you never find good coordination where there is paralysis.

The COURT: What is meant by "coordination", Doctor?

A. His ability to coordinate, or having everything in unison, that is the meaning.

It means his ability to control the motion of his hands, to do some certain thing with it.

Cross-examination.

135 By Mr. SEHORN:

A reflex examination is an examination to make tests to see whether the reflex arc is in action. If the reflexes are exaggerated that is an objective symptom. If you find the reflexes below normal, sluggish, that would be an objective symptom, too. Mr. Wagner's patella reflexes at times were exaggerated, that is what we call an objective symptom—you can see a jerk. That is not necessarily indicative of an injury or an abnormality of the spinal cord or of the nerve centers—it might be, of course, from other reasons without real injury—might be from excitability. Excitability is due to an abnormality of the nerve centers—an extremely nervous man, of course, is abnormal. If the reflexes are exaggerated, that indicates to me, as a professional man, there is some abnormality, either of the spinal cord or of some connecting link—it is in the reflex arc, the receiving point, the line between, and that is either in the nerve centers or something leading to the nerve centers; primarily, physicians call it an abnormality of the cord.

I went out there to examine Mr. Wagner at the instance of the Railroad Company, in connection with Dr. Venable. Mr. Wagner offered no opposition to a thorough examination, he was frank with me, offered himself for examination; he did not manifest any desire to withhold anything. My conclusion about his foot was that it was a very painful spot and makes it painful for him to walk and to wear shoes, to get around like an ordinary man—there is no question about that at all.

The cause of that squint I found in his eye or divergence, supposing it has come since the injury, would depend upon entirely where the injury was located. If I could find anything around the eye injured, I would think that because this thing developed since the injury and since it developed he sees double it would indicate that somthing was the matter with the eye caused by the injury.

Q. Well, if it affects the sight, wouldn't that indicate it?

A. If it affects the center in the brain, yes, sir.

136 Q. Didn't you examine for anything of that sort at all?

A. Yes, sir, we made a test to see whether the pupils contracted or dilated.

It is possible for a man to have an injury to the nerve that controls the eye and partially affects the nerve in the eye and affects the vision line, not work in perfect unison with the other.

Q. Now, Doctor, if this man did not have this divergence at the time he was hurt and it has come since that time, wouldn't you ascribe the divergence of the eye as due to the injury he sustained?

A. If we could get any history of eye injury in any way, or center of the brain injury, I would say yes, sir.

Q. Well, he fell, he just fell back, you know—that is all he knows about it, and mashed his foot, and these conditions have come since. Now, suppose he struck his head, wouldn't it have a tendency to produce this condition of the eye?

A. It possibly would, yes, sir; assuming that it was not there before, but has come since, that is a possible consequence. That divergence of the eye is usually observable, anybody can see it—I saw it that day very plainly when I looked at it and examined it—anybody could see it, you might see it by looking closely.

I didn't find that his back from about the ninth rib down to the end of the backbone was hypersensitive, I didn't think so; as to finding it exceedingly sensitive to pain, I will state that he would flinch a little at the time, and then if his attention was elsewhere he would not.

His nervousness was rather great, he was rather a nervous man, you noticed it in his whole make-up, you noticed it in his speech and in his movements. He never spoke in a hesitating manner—
137 rather the other way, rather slightly excited; he could get words out altogether at times, he talked plainly did not hesitate over it.

Q. Then he spoke very quickly, staccato way, is that it?

A. Much quicker than slow, yes, sir.

Altogether I do not consider him a man in a normal condition.

(Witness excused.)

The defendant called J. T. HANCOCK, who was first duly sworn by the clerk and who testified as follows:

Direct examination.

By Mr. BOYLE:

My name is J. T. Hancock. At the present time I am yardmaster at Kenedy for the San Antonio & Aransas Pass Railway Company.

I am acquainted with Mr. L. S. Spencer, a man who sued the San Antonio & Aransas Pass Railway Company a few years ago. I have engaged in wrestling matches with Mr. Spencer, since that suit was filed—I engaged in wrestling matches with him last summer and summer before last. I have seen him engaged in wrestling matches with other people. I seen him wrestle with this
138 young Uze, that is on the Fire Department now; I saw him wrestle this Anderson, the soldier at the Post—we were out there working together, take turn around, first one and then the other would work with each other. Mr. Spencer put up a pretty tough fight for a man of his size—he gave me all I wanted, and I was about forty or forty-one pounds the heaviest. I have had some

years' experience as wrestler. Mr. Spencer made a pretty good showing in these wrestling matches I saw him engaged in; this man Anderson, these matches were not given in the opera house, mind you, they were given in the gymnasium out there at the Army Post, you understand—they were not public affairs, simply private, simply taking exercise, we were only learning, he was and I was seeing what we could do, to the best we could. With reference to other athletic exercises I have seen Spencer perform in besides wrestling matches, I will state I have seen him punch the bag, and take a broom handle and jump through it three or four times—jump through it and jump back—I mean hold on to it and jump through it; that is all right as a physical exercise, a man would have to hold it and jump through; I can't do it myself, and I am a pretty good physical man myself. I saw Spencer go through exercises lifting weights, showing the absolute strength in the man: At his house, this man McLeod from Chicago, who used to be champion wrestler of the world, was out there. I saw him wrestle there.

Q. Now, how long did you see him do this after the wreck?

A. In the summer of 1911. You asked me about dumb bells. Mr. McLeod had a set of dumb bells weighing, I think, 105 pounds on the scales, and I seen Mr. Spencer take them up like that (illustrating) and lift them up, taking exercise—it was a double dumb bell, fifty pounds on each end.

139 I don't know the exact year that Mr. Spencer was injured, but I imagine five or six years ago.

Cross-examination.

By Mr. SEHORN:

I have known Mr. Spencer for a little over seven years. I am intimate friend of his, I have eat at his house and been with him, ran with him, mingled with him; not so much the last few years; you see, he got hurt running on this road, and then I din't see much of him up to during the spring of 1911, but from then on we were very often together.

Redirect examination.

By Mr. STOREY:

I saw Spencer while he was going around on crutches. I don't know how long it was after he put down his crutches that I saw him wrestle with the champion of the world—it was some little time.

(Witness excused.)

The defendant here offered in evidence a portion of the plaintiff's original petition in the case on trial, tried March 12, 1912, counsel stating it was offered for the purpose of showing what injuries plaintiff claimed at that time, as follows, to-wit:

140 "Plaintiff avers that by reason of his slipping, as aforesaid, his left foot was caught between the couplers of said en-

gine and said car and was mashed and mangled to such an extent that a portion of the anterior part of his said left foot and four of the toes thereof were amputated, and this left said foot tender and sore besides making it impossible to walk on said foot or to use the same in a natural manner. That in addition thereto, he struck his back on some portion of said engine or other object, and he likewise wrenched his back and his sides; that his spine was injured; that he sustained a profound shock to his entire nervous system, and his heart and his kidneys were likewise injured." * * *

Testimony closed.

141 STATE OF TEXAS,
County of Bexar:

I, Henry L. Gazley, Official Court Reporter 57th Judicial District, do hereby certify that the foregoing 48 pages contain a full, true and correct statement of the facts adduced in evidence on the trial of said Cause No. B-3488, entitled William Wagner vs. San Antonio & Aransas Pass Railway Company, said Statement containing all the oral evidence in narrative form, including depositions, offered and introduced in evidence at said trial, together with all the documentary evidence, reference to sketches, and all other matters used in evidence on the trial of said cause.

Said statement of facts being made in duplicate, in accordance with the Statute, from the Official Question and Answer Report of said trial, on file in the office of the Clerk of the District Court of Bexar County, Texas.

Witness my hand officially this August 21, 1913.

HENRY L. GAZLEY,
Official Court Reporter, 57th Judicial District, Bexar County, Texas.

142 *Agreement of Counsel.*

We do hereby agree that the foregoing *on* 48 pages is a full, true and correct Statement of Facts in said Cause No. B-3488, entitled William Wagner vs. San Antonio & Aransas Pass Railway Company, and approve the same as the Statement of Facts in said cause, this 29. day of July, 1913.

JOHN SEHORN,
Attorney for Plaintiff, William Wagner.
HOUSTON, BOYLE & STOREY,
Attorneys for Defendant, San Antonio & Aransas Pass Railway Company.

Judge's Certificate.

The foregoing Statement of Facts having been submitted to the interested parties for any corrections and changes deemed necessary, and all matters of difference having been settled between counsel as

to the correctness of same, said Statement of Facts is hereby approved as the full, true and correct Statement of Facts in said cause No. B-3488, entitled William Wagner vs. San Antonio & Aransas Pass Railway Company, and ordered filed this 30th. day of August, 1913.

R. B. MINOR,
Judge 57th Judicial District, Bexar County, Texas.

143 Endorsements on Statement of Facts:—

No. 5206. Filed in the Court of Civil Appeals at San Antonio, Texas, Sept. 9, 1913. Jos. Murray, Clerk.

144 *Opinion of Court of Civil Appeals.*

Filed March 4, A. D. 1914.

No. 5206.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY, Appellant,
vs.
WILLIAM WAGNER, Appellee.

Appeal from Bexar County.

Appellee sued to recover damages arising from personal injuries inflicted on him through the negligence of appellant. It was alleged that appellee was a brakeman in the employment of appellant and while engaged in coupling a locomotive and car it became necessary for him to stand on the foot-board of the engine between it and the car and shove the knuckle of the coupler on the engine so as to put it in position to be coupled to the car, and while so engaged he slipped and fell and his left foot was caught between the couplers and was crushed and mangled and that he was otherwise seriously, painfully and permanently injured. It was charged that appellant was negligent in having couplers which would not couple by impact as required by law and that such negligence was the direct and proximate cause of appellee's injuries.

The evidence developed the fact that appellee was injured as alleged through the negligence of appellant in not having the cars properly equipped with couplers that would couple by impact, and prevent the necessity of going between the cars to couple them.

The first assignment of error assails the ruling of the trial judge in sustaining exceptions to that part of appellant's answer which pleaded the Federal Law as to couplers and further that its couplers had to be adjusted at times in order to be coupled by impact, that the work of adjusting the couplers could have been done with perfect safety if the cars had been standing, but that appellee sought
145 to adjust the coupler when the engine was moving towards the car. The assignment is overruled. If, as contended by appellant, the Federal law as to couplers was applicable to this case,

appellant was not injured by having the pleading as to that statute stricken out, because the Federal and State statutes are practically the same and all of the issues that could arise under either were submitted to the jury. The Federal Act of 1893 made it unlawful for railroad companies to haul or permit to be hauled or used on their railroads any car in interstate traffic "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." U. S. Comp. Stats. of 1901, p. 3174. The Texas law, Art. 6710, Rev. Stats. 1911, makes it unlawful for any railroad company engaged in interstate commerce" to haul or permit to be hauled or used on its line of railroad within the State of Texas any locomotive, tender, car or similar vehicle employed in moving intrastate traffic within the said State, which is not equipped with couplers coupling automatically by impact and which can be coupled and uncoupled without the necessity of men going between the ends of locomotives, tenders, cars and similar vehicles". The State law seems to be more comprehensive than the law of Congress, but the decisions of the Supreme Court of the United States have construed the Federal Statute so as to render it fully as comprehensive as that of the State. The substance of those decisions has been embodied in the Texas Statute along with the plain provisions of the Federal Statute.

As substantiating the statement that the Federal decisions have read into the Federal Statute every provision in the State Statute not mentioned in terms in the Federal Statute, we cite the case of Johnson v. So. Pac. Company, 196 U. S. 1, in which it was held that locomotives are embraced in the words "any car" used in the Statute and that the provision of the Statute that cars should have couplers

"which can be uncoupled without men going between the
146 ends of the cars" included coupling as well as uncoupling.

The rejected answer admitted that the couplers were such as required adjustment in order to couple and that the adjustment had to be made between the cars, and sought to excuse itself on the ground that appellee should not have attempted to make the adjustment while the cars were in motion. The statutes, Federal and State, will not bear the construction that couplers are sufficient that require adjustment by going between the cars. The object of the statutes was to obviate the necessity of men going between cars to uncouple them whether moving or standing. To quote the language used in Johnson v. Southern Pacific Company, herein cited: "The object was to protect the lives and limbs of railroad employes by rendering it unnecessary for a man operating the couplers to go between the ends of the cars. * * * The primary object of the act was to promote the public welfare by securing the safety of employes and travelers". If men were required to go between "the ends of cars", whether standing or moving, in order to adjust the couplers, neither the Federal nor State law was complied with. They did not act automatically if they required that a man should go between the ends of cars to adjust the couplers before they would act. The couplers on the car and engine had failed to act when

brought together and appellee was injured while trying to adjust the coupler on the engine so that it would couple. Merely putting couplers on the cars did not meet the requirements of the law, but they must be in such condition as to couple by impact. So it was held in the Johnson case herein cited.

It is insisted by appellant that it was prevented by the answer being stricken out from proving that the engine and car were equipped as required by law, but the statement of facts contains testimony to that effect introduced by appellant. Under the general denial appellant could have shown all that it pleaded in regard to its couplers, and it was permitted to prove all that it offered on that subject.

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Under the facts of this case neither proof of assumed risk nor of contributory negligence offered any defense. The uncontroverted evidence showed that if the engine had been equipped with a lever by which the coupler could have been adjusted without the necessity of going between it and the car there would have been no accident. If appellant's answer had been permitted to stand it could have availed it nothing, for its admission that it was necessary to go between the cars to adjust the couplers was an admission that it was guilty of a violation of Federal and State law, and no plea of contributory negligence or assumed risk could relieve it of liability. Arts. 6649 & 6650 Rev. Stats. 1911; Compiled Stats. U. S. of 1901, p. 3174; Act of Congress April 22, 1908, U. S. Comp. Stats. Supp. 1911, p. 1323. Whenever injury or death is caused by a failure to comply with the demands of the safety appliance laws there is absolutely no defense that can be presented by the railroad company. Railway vs. Taylor, 210 U. S. 281; Railway v. United States, 220 U. S. 559, Mondou v. Railway, 223 U. S. 1; Winfree v. Railway, 227 U. S. 296.

There were but two issues in this case, which were submitted to the jury by the court, the first being whether the engine was equipped with some couplers as the law requires, and if not was the failure to have it so equipped the proximate cause of the injuries inflicted upon appellees. The court very properly refused to allow other issues, proposed in the special charges requested by appellant, to be interpolated into the case. The only defense that could be presented was that the locomotive was equipped as required by law, and that defense was presented by the court. All of the assignments presenting complaints as to the refusal to give the special charges are overruled.

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The evidence of appellee as to the necessity of shoving the drawhead over so as to make the coupling was the statement of a fact, but if it was an opinion it was the opinion of one who was qualified as an expert and it was admissible. Appellee stated that he saw that the drawhead "was shifted way over to my side and I reached up with my left foot to shift it over so it would couple. * * * If I had not shoved that drawhead over, it would have slipped by and probably have mashed me through here (indicating hip)." None of that testimony was objected to although it was in substance the

same as that to which objection was urged, because it showed the necessity for pushing the drawhead. Appellee had been employed as a brakeman by appellant for thirteen months and had worked as a brakeman for eight years, and was acquainted with the operation of couplers.

A stenographer's report of what witnesses may have testified in other cases could not be used to question the competency of a doctor who testified in the other cases as well as in this. The cases cited by appellant have reference to the stenographer's report of the testimony of a witness, sought to be impeached, on a former trial of the same cause. No decision is submitted holding that the evidence of third parties on a collateral issue in the trial of a different case could be used to impeach a witness in the instant case.

In his closing argument to the jury appellee's counsel used the following language: "I want this jury to give the plaintiff every cent that it possible can, under the pleadings and evidence. You cannot make a mistake in giving him too much, under the evidence, if you do the court has the power and it is his duty to cut it down; but if you make it too low, even if your verdict should be for five dollars, there is no power in this court to add even a single
149 postage stamp. Therefore I again ask you to make your verdict as high as you possibly can under the evidence as you can make no mistake in that direction." The language is decidedly improper and should have been rebuked by the court. Using the expression "under the pleadings and the evidence" did not eradicate the poison that was injected by the appeal to place the responsibility of the amount of the verdict on the trial judge. A very similar argument was condemned in the case of Railway v. Nesbit, 40 Tex. Civ. App., 209. In that case the attorney said: "If you should give a verdict that is too small, it would not be raised up, but if you give a verdict that is too large, the Appellate Court will correct it by cutting it down. Therefore, if you err, you should err on the side that can be corrected by the Appellate Court. I am not going to make any mistake, and I will state that it is primarily your duty to assess the damages in this case in accordance with the charge of the court and the evidence; but while this is true, if you make a mistake and allow him too much, the Appellate Court will correct it". The Court of Civil Appeals said: "The duty of revising jury verdicts in matters of amount is both difficult and delicate, and it ought not to be rendered more so by an invitation to a jury to resolve all doubts in favor of a large verdict, thus passing up to the trial judge and to this court a duty which is not only primarily, but finally theirs. * * * Such language is a most insidious temptation to a jury, and it is doubtful if its effect can be withdrawn by any action of the trial court." In that case the trial judge by both verbal and written instructions sought to prevent the jury from considering the language, in this case no effort was made to withdraw the language from consideration, but objections to it were overruled. The size of the verdict shows an active response to the ap-

peal of appellee's counsel. Appellee claims there was no error
150 in the argument because the jury were advised to bring in a large verdict "under the pleadings and the evidence," but that could not remove the force of the argument to the effect that the jury should shift the responsibility of a heavy verdict to the trial judge. In the Nesbit case the jury was told that it was their duty to assess the damages "in accordance with the charge of the court and the evidence."

This court is burdened too much with the onerous duty of passing upon the question of excess in verdicts when brought up in a legitimate manner, and that burden must not be increased by deliberately inviting the jury to bring in excessive verdicts and speculate on the Court of Civil Appeals allowing the amounts to stand or cut them down to reasonable sums. The jury in this instance was told that it was the duty of the trial court to reduce excessive verdicts, and that was true, but it was not exercised in this case. Trial judges seem adverse to exercising the power entrusted to them in connection with verdicts and usually shift the responsibility, shifted to them by the jury, to the Court of Civil Appeals, the court of ultimate resort in such matters. To reasonably reduce a verdict obtained as this was, seems to be doing what counsel expected and maneuvered to secure, and the court in the Nesbit case refused to entertain the proposition to cut down the verdict. This court, however, has in several instances sought to remedy the injury inflicted by improper argument by compelling a remittitur. Producers Oil Co. vs. Barnes, 120 S. W. 1023; De La Vergne Co. v. Stahl, 24 Tex. Civ. App. 471, 60 S. W. 319; W. U. Tel. Co. v. Perry, 30 Tex. Civ. App., 243. The argument in this case, as in those cited could have affected nothing except the amount of the verdict. There was over half of the jury that at first favored a verdict for ten thousand dollars and that, under the facts, we deem sufficient to compensate appellee for the loss of his toes on one foot, and the other injuries received.

The twenty-fourth assignment of error which seeks to present improper conduct of the jury in arriving at a verdict, is not followed by such a statement as is required by the rules. It has been
151 held time and again that a reference to a bill of exceptions in the record is not sufficient. Griffin v. State, (Tex. Civ. App.) 147 S. W., 328; Gibson v. Oppenheimer, (Tex. Civ. App.) 154 S. W. 694.

The case of Morris v. Railway, 158 S. W., 1055, is cited by appellant as deciding that a defective coupler that required adjustment before it would couple, did not come under the condemnation of State and Federal law. The decision in that case can be justified only by the fact stated that it was not shown that the coupler could not have been adjusted without going between the engine and the car. If the opinion can be construed into holding that a railroad company is under no obligation to keep its coupler in such condition as to couple by impact without the necessity of any one going between the ends of the cars, it is in direct conflict with State and Federal decisions which construe the act of Congress. Thornton, Federal Employer Act, p. 293; Railway v. Voelker, 129 Fed. 522.

"The true intent and meaning of the statute is not merely that the cars, etc. used in moving interstate commerce shall be equipped with automatic couplers of the description therein mentioned, but also that such couplers shall be in such condition as to be used automatically while such cars are so engaged." Winkler v. Railway, (Del.) 53 Atl. 90; United States v. Railroad, 177 Fed. 801; United States v. Railway, 160 Fed. 696. See numerous cases reported in Appendix to Thornton Fed. Emp. Liability & Safety App. Acts, pp. 396 to 710. We do not think that the Court of Civil Appeals of the Sixth District intended to hold anything except that the proof in that case failed to show that the coupler to the engine could not have been adjusted without going between the engine and car. In this case, however, the proof is positive that it was absolutely
152 necessary for appellee to go between the engine and car to adjust the coupler. Appellant in its pleadings practically admitted that the coupler could not be adjusted without going between the engine and car.

If a remittitur of $5,000 is filed by appellee within ten days, the judgment will be affirmed, otherwise it will be reversed and the cause remanded.

W. S. FLY,
Chief Justice.

Opinion delivered and filed March 4, 1914.

Endorsements on Opinion: No. 5206. In Court of Civil Appeals, Fourth Supreme Judicial District of Texas, San Antonio. San Antonio & Aransas Pass Railway Company, Appellant, vs. William Wagner, Appellee. From Bexar County. Opinion by W. S. Fly, Chief Justice. Reversed and remanded, unless remittitur is filed. Filed in the Court of Civil Appeals at San Antonio, Texas, March 4, 1914. Jos. Murray, Clerk.

Remittitur.

No. 5206.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY, Appellant,
vs.
WILLIAM WAGNER, Appellee.

Suit Pending in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

Now comes the appellee William Wagner and remits the sum of $5,000.00 from the judgment rendered in this cause in his
153 favor. This remittitur is entered pursuant to the conditions named in the opinion of the Court, filed in this case on March 4, 1914.

WILLIAM WAGNER,
By JOHN SEHORN,
Attorney of Record.

Endorsements on remittitur: No. 5206. S. A. & A. P. Ry. Co., vs. Wm. Wagner. Remittitur. Filed in the Court of Civil Appeals at San Antonio, Texas, Mar. 13, 1914.

Judgment of the Court of Civil Appeals.

No. 5206.

S. A. & A. P. Ry. Co., Appellant,
vs.
William Wagner, Appellee.

Appeal from District Court (57th District) Bexar County, Texas.

Wednesday, April 22nd, 1914.

This cause came on to be heard on the transcript of the record, and the same being inspected, and the court having on March 4, 1914, in open court announced that the judgment of the court below would be affirmed provided the appellee filed in this court a remittitur of ($5,000.00) Five Thousand Dollars of the judgment of the
154 Court below within ten days, and the appellee having been duly notified of such announcement, and with the permission of and on said indication of the court having on March 13th., 1914, filed the said remittitur so required by the Court; it is therefore considered, adjudged and ordered that said remittitur be allowed, and because the Court is of the opinion that there was no other error in the judgment, it is therefore further considered, adjudged and ordered that the judgment of the Court below in favor of appellee as reduced by said remittitur be affirmed; that the appellee, William Wagner, do have and recover of and from the appellant, San Antonio & Aransas Pass Railway Company, and its surety, U. S. Fidelity and Guaranty Company the amount adjudged by the Court below, to-wit: Fifteen Thousand ($15,000.00) Dollars, less said sum of Five Thousand ($5,000.00) Dollars remitted by appellee, said sum to be deducted from the amount of the judgment of the Court below, as of the date of said judgment, thereby reducing said sum to Ten Thousand ($10,000.00) Dollars, together with interest thereon from 2nd. day of May, 1913, (the date of the judgment of the Court below) at the rate of six per cent per annum, and all costs of the Court below; that the appellee, William Wagner, pay all costs of this appeal, and this decision be certified below for observance.

155 *Appellant's Motion for Rehearing.*

Filed March 19, 1914.

In the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, San Antonio.

No. 5206.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY, Appellant,
versus
WILLIAM WAGNER, Appellee.

Appellant's Motion for Rehearing.

The appellant, San Antonio & Aransas Pass Railway Company, respectfully moves this Honorable Court to set aside the judgment heretofore rendered by this Court affirming the judgment of the court below and to grant a rehearing in this cause, for the following reasons:

1st. Because the court erred in sustaining the action of the trial court in striking out, on motion of plaintiff, the special answer of defendant filed in this cause.

2nd. Because the court erred in holding that said defendant could have shown under its general denial, all that it pleaded in its special answer in regard to its couplers, and in further holding that said defendant was permitted to prove all that it offered on the subject.

3rd. Because the court erred in holding that under the facts of this case, the plea of contributory negligence afforded no defense to this suit, either under the Federal or State law, that would
156 relieve it of liability and that said defense was unavailable by reason of defendant's own admissions in said stricken answer that it was necessary to go between the cars to adjust said couplers, for the reason that defendant in said answer nowhere admitted that it was necessary for plaintiff to go between the engine and car to adjust said coupler.

4th. Because the court erred in sustaining the action of the trial court in striking out said special answer and in taking the question of contributory negligence entirely from the jury, for the reason that such defense must be specially pleaded and the same is a proper and legal defense under the State and Federal Statutes to be submitted to the jury in reduction of damages.

5th. Because the court erred in sustaining the action of the trial court in striking out said answer and in not permitting the introduction of any evidence based thereon, and thereafter entering a verdict, and judgment against this appellant because of the absence of such evidence, thereby directly creating the condition upon which verdict was rendered and judgment was based.

6th. Because the court erred in sustaining the trial court in striking out said special answer setting up the defense of contributory

negligence on the part of plaintiff, and in holding that under the Federal Statute contributory negligence is no defense, for the reason there is no allegation in plaintiff's petition that either plaintiff or defendant was engaged in interstate commerce at the time of the accident, this averment being made by defendant in its special exception and special answer, which were overruled and stricken out on motion of plaintiff, without which allegation of employment either in interstate or intrastate commerce at such time, plaintiff had no right to avail himself of the protecting provisions of the Federal or State Employers' Liability Act as to contributory
157 negligence, this omission being supplied only by defendant's pleadings which were stricken out on motion of plaintiff.

This Court, in brushing aside what it regards as all irrelevant issues injected into the case, assembles the salient questions involved in the following language:

"There were but two issues in this case, which were submitted to the jury by the court, the first being whether the engine was equipped with such couplers as the law requires, and if not, was the failure to have it so equipped the proximate cause of the injuries inflicted upon appellee. The court very properly refused to allow other issues proposed in the special charges requested by appellant, to be interpolated into the case." (Opinion p. 4.)

Appellant is not content in resting its case nor in seeing what it deems its legal rights swept away, without some further effort made in support of the several defenses offered in this suit, and with this idea in mind, will now take up the objections raised by this court in its opinion, to the defenses interposed by appellant in the trial court.

1st. In the second paragraph of its opinion, this court says:

"The evidence developed the fact that appellee was injured as alleged through the negligence of appellant *in not having its cars properly equipped with couplers that would couple by impact, and prevent the necessity of going between the cars to couple them.*" (Italics ours.)

We are frank to say that if any fact or facts were developed on the trial of this case showing any act of negligence on the part of appellant, which caused or created the necessity of appellee
158 going between the cars to couple them, in improper equipment of couplers or otherwise, the development was so inconspicuous as to escape our observation. The fact was developed that the couplers did not couple by impact, but it was not shown either by evidence or implication that they would not couple by impact by proper manipulation of the lever on the side of the car, the absence of which manipulation by appellee, appellant contends, unquestionably caused the subsequent misadjustment of the engine's drawbar. There is not one line of evidence in the record which shows that appellant did not have its cars properly equipped with couplers that would couple by impact; if there be such evidence, we have overlooked it.

2nd. On page 2 of the court's opinion, third paragraph, the court says:

"The rejected answer admitted that the couplers were such as required adjustment in order to couple and that the adjustment had to be made between the cars, and sought to excuse itself on the ground that appellee should not have attempted to make the adjustment while the cars were in motion."

Appellant is unable to agree that its rejected answer is subject to the construction placed upon it by this court. As appellant views it, no part of said answer admits that the "adjustment had to be made between the cars." The extreme limit of admission is that same could and should have been made by appellee by going between the engine and cars while they were standing and not while they were in motion. In substantiation of the contention, the exact language of the answer is here quoted: "And said couplers could and should have been adjusted by plaintiff only after bringing said engine and said cars to a standstill and going between the ends of the cars and there was no necessity for plaintiff to go between moving engine and cars or kicking said coupler over with his foot while said engine was in motion, or endangering his own personal safety in any way." (Tr. p. 6.)

159 Again:

"That the engine and cars which the plaintiff was employed upon at the time of his injury were engaged in interstate commerce, and were equipped with automatic couplers which would couple automatically by impact, as required by said Act of Congress; but an adjustment was necessary to enable said couplers to couple automatically by impact, and could have been made by the plaintiff going between the cars while they were standing, but without going between the ends of the cars while in motion or between a moving engine and cars, or without kicking said coupling, or in any manner endangering his own personal safety." (Tr. p. 6-7.)

Again:

"That the work of adjusting said couplers to couple automatically by impact, could have been done by plaintiff or any other person with perfect safety to himself and without any danger or risk of injury by going between the engine and car while standing, but that the plaintiff negligently, recklessly and carelessly sought to adjust the couplers on said engine and cars while the engine was moving upon and close to the car to which it was sought to be coupled by kicking the coupler with his foot * * * negligently and recklessly and in utter disregard of his personal safety." (Tr. p. 7.) * * * and that while said coupling apparatus required adjustment before it would couple automatically by impact at the time of the accident complained of, there was no necessity for plaintiff going between the engine and cars while in motion, or in any manner endangering his personal safety to make such adjustment." (Tr. p. 7.)

The only purpose of the foregoing pleading was to predicate the defense of contributory negligence, which, it has been held under both the Federal and State Safety Appliance Acts is

160 permissible in reduction of damages, unless it can be shown there was negligence on the part of the defendant by reason

of some defect or insufficiency in its cars, engine, appliances, etc., and there is no reported case where the plea of contributory negligence has been denied the defendant unless such defect in the couplers was clearly proved, and such defect must be alleged in plaintiff's petition, to admit the proof. In this case, no defect whatever is alleged, the only allegation being that the coupler would not couple automatically by impact, as required by law.

The rejected answer did not contemplate nor have any bearing whatever on the condition or sufficiency of the couplers or appliances and had no reference thereto, but applied solely to the conduct of the plaintiff, even though he disregarded his duty to use the hand lever on the side of the car in the adjustment of the coupler, which is absolutely necessary in order to safely effect a coupling or uncoupling contingent upon whether the coupler be open or closed at the time of the impact; the issue raised by the pleading being that plaintiff had selected the most dangerous method he could possibly have taken for effecting a coupling, appellant confidently relying upon all previous decisions, at no time presupposed that the defense of contributory negligence would be denied to it in reduction of damages, in the absence of some defective conditions of the couplers or appliances due to its negligence, never contemplating that it would be held likewise responsible for the deliberate and gross negligence of the appellee, in his failure and refusal to use and operate the lever attachment connecting with all couplers as required by law. Nor was there a particle of evidence or testimony in the case showing or tending to show, that plaintiff had to go between the engine and car to adjust the coupler or to effect a coupling. In fact, the decision of both the trial court and of
161 this Court, is mainly based on the absence of evidence showing that plaintiff did not have to go between the engine and car for the purpose stated, when this absence is accounted for solely by reason of the trial court's ruling,—refusing to permit such evidence to be introduced by appellant. Furthermore, where a pleading is stricken out on motion of the adverse party, and was not read to the jury admissions contained therein cannot be used in aid of a verdict in favor of the party at whose instance it was stricken out. This is elementary. Daily v. Coker, 33 Tex. 815; Watters v. Parker, 19 S. W. 1022 (Tex. Sup.).

Is it not apparent to this Court that if this position of the trial court be sustained, it effectually ties the hands of every carrier in the State, and denies to them any defense whatever to suits of this character, leaving the way absolutely clear for a plaintiff to recover though he be by his own gross negligence or deliberate conduct, the sole and proximate cause of the failure of a coupler to couple automatically by impact? The effect of the decision is too apparent for further comment.

3rd. On Page 3 of its opinion the court says:

"It is insisted by appellant that it was prevented by the answer being stricken out from proving that the engine and car were equipped as required by law, but the statement of facts contain- testimony to that effect introduced by appellant. *Under the general*

denial appellant could have shown all that it pleaded in regard to its couplers, and it was permitted to prove all that it offered on the subject." (Italics ours.)

The procedure on the trial does not bear out the foregoing italicized assumption; and in view of the apparent fact that the decision of this court mainly rests upon the alleged admissions of appellant in its expunged answer, and that it was afforded all opportunity to prove all that it offered on the subject, under the general denial, which position of this court could never have been

162 anticipated in the main brief, the court is respectfully asked to refer to the stenographer's official report of this trial for facts omitted from the record covering the exclusion of the testimony relative to the required equipment and its operation with the rulings of the court and objections thereto, and containing practically the vital facts and issues in this case, which may be found on pages 75, to 81; 89 to 100 inclusive, of the reporter's transcript of the testimony and proceedings and on page 111 of which the court instructs the jury on the exclusion of all testimony as to the operation and adjustment of the couplers, as follows:

"Gentlemen of the Jury, I wish you would pay particular attention to me at this time, as you will not have this, this will not be taken with you in the jury room. I want you to remember it carefully. The court having admitted before you certain testimony with reference to adjusting couplers on engines and cars on account of lateral play in order that they might couple automatically by impact, and having admitted before you a certain rule of defendant with reference to prohibiting employes from taking dangerous positions while engaged in their work; and also having admitted before you testimony tending to show that the plaintiff should not have kicked the coupler over in the manner he claims to have done at the time he was hurt, but that he should have had the engine stopped and gotten down and adjusted the coupler, if necessary, to make said coupler couple automatically by impact; and the court being now of the opinion that such testimony is not admissible to prove any issue of this cause, I do now exclude the same from your consideration and direct you in considering your verdict in this case you do not consider any such testimony."

(Stenog. Trans. p. 111). The Stenographer's transcript is

163 herewith filed for the court's inspection, should it care to verify the statements of contention of appellant.

The foregoing charge and the prior ruling of the court specifically eliminated the defenses of appellant under both the general denial and special answer, and shows conclusively that the assumption of this court that 'appellant could have shown all that it pleaded in regard to its couplers, and it was premitted to prove all that it offered on the subject," is erroneous. Furthermore the ruling of the trial court, which is sustained by the holding of this court, that the fact that the couplers did not couple automatically by impact at the time of the accident, was all that plaintiff had to prove under the Safety Appliance Acts, in order to be entitled to recover. Under this ruling whether plaintiff deliberately and intentionally

disabled the coupler and drawbar prior to the attempted coupling, or purposely refrained from the use of the lever attachment, were questions not permitted to be raised. Furthermore, the court's ruling effectually cut off the introduction of all evidence as to how the engine and car in question were equipped, which explains the absence of all evidence or testimony as to the hand lever appliances which properly belong to and are a necessary part of all automatic couplers, by which the coupling pin should be at all times operated from the outside of the car and beyond the danger zone.

4th. The court further says in its opinion, on page 3 thereof as follows:

"The uncontroverted evidence shows that if the engine had been equipped with a lever by which the coupler could have been adjusted without the necessity of going between it and the car there would have been no accident."

In view of the ruling of the trial court and of this court that no adjustment is permitted under the State and Federal Statutes, this gratuitous interpolation of the question in the case, after the ruling noted, increases the burden of the defense when per-
164 mission was denied by the trial court to meet it, although that was the main issue raised by appellant in the court below and the only defense it had in the case. Besides, there is not one line of testimony or a particle of evidence in the record, as to whether or not, either the engine or car was equipped with such lever; the contention of appellant being that in the absence of such evidence it must be presumed they were so equipped, the further contention being that the failure of the appellee to use such lever was the sole and proximate cause of his injuries, the question of adjustment being ruled out of the case, appellant was precluded by the trial court from introducing any evidence as to such lever equipment. The record does show, however, that appellee at no time either before or after the first impact, stepped to the side of the car to use or did use the hand lever forming a part of the coupler, for the purpose of manipulating the pin, adopting the more dangerous method of shaking down the pin with his hands, (S. F. pp. 2, 6, 7.) which deliberate act of gross negligence and the contributing cause of his injury, is permitted by this court and the trial court in order to establish his case.

Further, as to the engine being equipped with a lever by which the coupler could have been adjusted, the lack of which is indicated by the court as being the cause of the accident. Referring again to the idea that the decision of the trial court and of this court, seems to be based on what was not shown, rather that what was in evidence, it might be pertinent to suggest, as amicus curiæ, that there is no such appliance in existence and never has been as a lever for the adjustment of the coupler on a switch engine the same being impracticable and has never been required. Furthermore, plaintiff testified that he saw nothing wrong with the coupler on the engine at all when the engine and car first came together; it was all with the other, the coupler on the car. (S. F. p. 8.) And the drawbar at that time was straight and hit square.

(Ib.) The play allowed to the drawbar, the evidence showed, did not exceed two inches, which renders it practically
165 an impossibility to get so far out of alignment to miss coupling by impact (S. F. p. 26), if the jaws of the couplers are open at the time of the impact. The mechanical construction of an automatic coupler, and those in use by plaintiff at the time of this accident, is such as to make it an impossibility for the couplers to couple automatically by impact, if the knuckle is closed. (209 Fed. 795). Plaintiff testified at four different periods of his testimony that when he came out of the house track to couple onto those two cars, at the first impact the coupling wouldn't make; that he then stepped down off of the footboard, after slacking the engine ahead, and closed the knuckle and dropped the pin with his hand; (S. F. pp. 2, 3, 6, 7), thereby locking the knuckle (S. F. pp. 6, 8, 12) and making it an impossibility for the coupling to make thereafter.

Pursuing the line of absent treatment further, there is no evidence in the record, by reason of the ruling of the trial court, showing whether the coupler on the car at the time of the first impact was open or closed. All the evidence shows that appellee did not go to the side of the car or use this lever in any way before the first impact or afterwards. Appellant's witnesses, if permitted to testify, would have shown that the mechanical construction of the coupler and lever attachment in use at the time of the accident, is such that the raising of the lever on the side of the car raises the pin, which being provided with a foot attachment at the bottom automatically kicks open the knuckle of the coupler, as the lever is raised, thus putting it into position for automatic coupling. This not having been done by plaintiff, would indicate that the coupler on the car was locked at the time of the first impact, which made it impossible to form the coupling not only required by law but by the law of mechanics, under which the coupling appliances was con-
166 structed.

What we have said applies as well to the statement of the court on the 7th page of its opinion, where in discussing the Morris case, it concludes: "In this case, however, (Wagner case) the proof is positive that it was absolutely necessary for appellee to go between the engine and car to adjust the coupler. Appellant in its pleadings practically admitted that the coupler could not be adjusted without going between the engine and car."

That was plaintiff's own testimony, without one single circumstance or witness corroborating him. The defendant was not allowed to meet this testimony by proof absolutely certain and convincing to the contrary. In other words and with plainer meaning, by the ruling of the trial court, and the judgment of this court, if allowed to stand, appellee in effect takes judgment by default, the same as if no answer were filed. Appellant is therefore far from being convinced that it has had a fair trial below, or a correct decision of the case by this court, even on the present state of the record.

Contributory negligence under Safety Appliance and Employers' *Liberty* Acts.

5th. Under past decisions construing the Safety Appliance and Employers' Liability Acts, we are unable to comprehend the position taken by the trial court and by this court in the present case.

The case relied upon mostly by the appellee and by this court to sustain the rulings and judgment of the trial court seems to be the Johnson case. (196 U. S. 1) In that case the couplers on the locomotive and car attempted to be coupled, were of different make and would not couple automatically by impact, which made it absolutely necessary, in order to effect a coupling, for plaintiff to go between the ends of the cars. The Safety Appliance Act
167 only requires that every car be "equipped with couplers coupling automatically by impact, and which can be uncoupled (or coupled) without the necessity of men going between the ends of the cars." The record shows that the couplers involved in this case not only could be coupled automatically by impact, but did actually so couple almost immediately after the accident. (S. F. p. 34.) On this point the Johnson case only decided that the Safety Appliance Act plainly forbade the use of cars which could not be coupled together automatically by impact, by means of the couplers actually used on the cars to be coupled. (196 U. S. 16).

Let us again examine the decision on the question in controversy by citing a few late cases in the Federal courts on the coupling feature at issue.

In Wheeling Terminal Ry. Co. v. Russell, 209 Fed. 795, decided by the United States Circuit Court of Appeals for the Fourth Circuit on December 8, 1913, the question of coupling by impact was directly involved and while the proceedings in the lower court are not made clear, enough is shown to exhibit the fact that the question was submitted to the jury on the phase of contributory negligence. In the opinion, the Court of Appeals says:

"The Court below told the jury that they could not find for the plaintiff unless, by a preponderance of the evidence, they were satisfied that at the time of the injury, the cars which he was assisting in coupling had either never been equipped with couplers coupling automatically by impact, or that the couplers on said cars had become so broken, out of repair, defective, or insufficient that they would not couple automatically by impact, and that said injury was directly caused either by the failure to so equip said cars or by the fact that the Couplers on said cars had become so broken, out of repair, or insufficient, that they would not couple automatically by impact. This instruction gave the defendant
168 the benefit of all the law to which it was entitled. Johnson v. Southern Pac. Co., 196 U. S. 1; Chicago, Burlington & Quincy Ry. Co. v. United States, 220 U. S. 559; Deck v. St. Louis & San Francisco Ry. Co., 220 U. S. 580." (p. 799.)

"The defendant complains that the court refused to instruct the jury to find for the defendant if they believed that:

While the defendant was engaged in weighing said cars, the knuckles of one of them was closed to aid the defendant in weighing said cars, that said knuckle was still so closed at the time of said

injury, and that said closing of said knuckle prevented the coupler of said car from coupling automatically by impact and was the direct cause of said injury?

"Quite obviously this instruction, in the form in which it appears in the record, could not have been properly given. Doubtless, however, the word 'defendant' where we have italicized it, was intended to be 'plaintiff' and was so understood by court and counsel. Even so it was misleading. It ignored the evidence offered by the defendant itself that, when the couplers were in order, they could be opened without going between the cars." (Ib.)

The foregoing excerpts from the opinion show quite clearly that the question of the equipment and condition of the coupler at and before the time of the accident, and that they could be opened without going between the cars, was submitted to the jury as a question of fact. Further, in the case just cited, the plaintiff had first tried to get the coupler to work by using the lever at the side of the car, provided for that purpose, and did not succeed, and then went between the cars to manipulate the coupler, which had failed to work by using the lever.

In Southern Ry. Co. v. Snyder, 205 Fed. 868, the circuit court of appeals for the sixth Circuit says:

169 "The defense of contributory negligence is material here because the Safety Appliance Statutes do not take away contributory negligence as a complete defense (Schlemmer v. Buffalo, etc. Co., 205 U. S. 1, 11); and the accident having occurred before the passage of the Second Employers' Liability Act (Act April 22, 1908) the present case is not affected by the provision of that Act, which makes contributory negligence operate only in reduction of damages. (Winfree v. Northern Pac. Ry. Co., 227 U. S., 296.)"

We are endeavoring to point out to this court the fundamental error committed by the trial court in holding appellant negligent as a matter of law, declining to consider the question of contributory negligence of plaintiff in any aspect of the case, as a question of fact for the jury, and excluding all evidence of testimony tending to establish the contention that he did contribute to his own injuries by his unjustifiable and unnecessary acts of negligence, the trial court refusing to admit all such testimony and therefore declining to submit such question of contributory negligence to the jury to be considered in reduction of damages, as provided by said Employers' Liability Act, as construed by all the Federal Courts since its enactment; the Act providing that the fact that the Employe may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe as compared with the combined negligence of himself and the employer—Norfolk, etc. Ry. Co. v. Earnest, 229 U. S., 114.

The verdict for appellee being sustained only by reason of the absence from the record of evidence excluded by the trial court, the want of testimony to support it is fundamental error and ground for reversal. (Mason v. Rodgers, 83 Tex. 389.)

170 6th. It is an elementary principle in pleading and evidence that a plaintiff should not be permitted to prove what he has not alleged nor recover on a cause of action not averred in his pleadings. There is no direct allegation in plaintiff's petition that defendant was engaged in interstate commerce at the time of the accident, or engaged in intrastate commerce at said time, in order to afford him a right of action thereunder, or the benefit of either of the Federal or State Statutes governing the same; the only allegation being that said engine and said car were used in such commerce (Tr. p. 1). The omission of said averments were only supplied by defendant's pleading, which *were* stricken out on plaintiff's own motion. (Tr. pp. 8-9). In the absence of these averments, defendant's exceptions being overruled and its special answer supplying said omissions being stricken out, plaintiff was not entitled to the protection afforded or benefits accruing under either of said statutes.

Mondou v. N. Y. [illegible]c. Ry. Co., 223 U. S., 1.
Pederson v. Delaware etc. Ry. Co., 229 U. S. 146;
Lycoming etc. Ins. Co. v. Wright, 55 Vt. 526;
White v. Central, etc. Ry. Co., 89 Atl. (Vt.) 618 (Jan. 12, 1914.)

For the reasons stated, appellant therefore asks that the judgment heretofore rendered by t[illegible]s court on to-wit, the 4th. day of March, 1914, and made final on the 14th. day of March, 1914, affirming the judgment of the district court, be set aside and a rehearing granted, and thereupon the judgment of the said district court be reversed and this cause remanded for a new trial. Appellant shows that John Seborn, Esquire, residing in San Antonio, Bexar County, Texas, with offices in the Kampmann Building in said city is counsel for appellee in this cause, upon whom service of this motion may be had, as required by law.

Respectfully submitted,

171 HOUSTON, BOYLE & STOREY,
Attorneys for Appellant,
S. A. & A. P. Ry. Co.

Endorsements on motion: No. 6192. No. 5206. San Antonio & Aransas Pass Ry. Co., versus William Wagner. In the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, San Antonio. Appellant's Motion for Rehearing. Filed in the Court of Civil Appeals at San Antonio, Texas, Mar. 19, 1914. Jos. Murray, Clerk. Houston, Boyle & Storey, San Antonio, Texas.

Appellee's Motion for a Rehearing.

Filed Mar. 19, 1914.

In the Court of Civil Appeals, Fourth Supreme Judicial District.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY, Appellant,
vs.
WM. WAGNER, Appellee.

And now comes the appellee and moves the court to grant a rehearing, of so much of this judgment as requires him to enter
172 a remittitur of $5,000.00.

The court has held that certain language used by counsel for appellee was of such a character as that it might have affected the amount of the verdict.

A careful reading of the opinion, however, disclosed that the court nowhere holds that the verdict of the jury, as rendered, was actually excessive. It is submitted as a proposition that unless the verdict is excessive any error committed by the court in not excluding from the jury the remarks made by counsel for appellee is harmless, and should not operate to destroy any part of the verdict in appellee's favor.

The case which the court cites to sustain its action in this case does not decide that the language there used, which was somewhat similar to that used by the appellee's counsel in this case was sufficient to reverse the judgment rendered in that case. On the contrary, the court expressly pretermits deciding the question whether the remarks of themselves were sufficient to cause a reversal of the case. (Railroad v. Nesbit, 40 Tex. Civ. App. 209.)

It is true that in that case the court does hold that the language used was improper. It is said there that the language is an insidious appeal to the jury to pass the question up to the appellate court in fixing the amount of the compensation. But nowhere in that case is it decided that the language there used, of itself, was sufficient to operate as a reversal of the judgment. The case was reversed for other reasons.

The verdict in this case was for only $15,000.00. The uncontradicted evidence shows that appellee has lost the four lesser toes of his left foot, and also establishes the fact that there is no padding where the lesser toes was amputated, so that it is impossible for him to walk on that foot. Every physician who testified in
173 the case testified to this fact. Appellee, therefore, is in the position of a man without a foot.

In addition, to this, the evidence, without dispute, shows that there is a divergence in one of his eyes. It is a disputed question whether that fact is due to the injury, or whether it is congenital. The evidence of the physicians offered by appellee tends to support the proposition that the divergence is due to the injury he sustained, and under the uniform decisions of the appellate courts in this

state the jury was justified in adopting that view of the evidence, and finding that this divergence in the eye was produced by the injury. On account of this divergence appellee sees double.

The evidence also tends to show that the appellee suffers from an injury to the spine. There is, of course, some conflict on this question, but it cannot be denied that the evidence of those physicians testifying for appellee is ample to sustain a finding that his spine was injured. The effect of this is to cause appellee intense nervousness. It affects his speech, so that at times he can not articulate clearly. His tongue and his organs of speech frequently become paralyzed.

The jury had a right, in view of this testimony, to find that the facts were as just stated.

With injuries such as these, therefore, it is plain that the jury would have been justified in finding a verdict for appellee for a much greater sum than $15,000.00.

We do not understand that this court has held that the amount awarded is excessive, and we do not believe, in view of the testimony referred to above, that the court will ever hold that it is excessive. This being the case, appellee contends that under the provisions of Rule 62-*a*, the error, if any, in the remarks made by appellee's counsel, was harmless in its result and therefore should not
174 operate to cause a reduction of any part of the judgment in appellee's favor.

It is not every error that appears in the record that would justify the reversal of a judgment. In order to operate as a reversal of a judgment or any part of it, the error must be substantial, and it must appear that the error was calculated to, and probably did cause the rendition of an improper judgment, or a judgment for a larger amount than otherwise would have been rendered.

Of course, if the court should say that the verdict was excessive, then these remarks would not be applicable; but if the court does not so hold, then we think it obvious that even though the remarks made by counsel for appellee were improper, as held by this court, any error in the use of the remarks has been harmless in its result.

Suppose, in this case, the jury had found a verdict for only $5000.00. It would be plain then that with injuries such as appellee has that the remarks made had no effect on the verdict of the jury. And if the facts justify a verdict for $15,000.00, as we contend they do, and this court has not held to the contrary, then we think it follows logically that if a verdict for $5000.00 would not have been disturbed, neither could a verdict for $15,000.00 be disturbed. It does not answer this contention to say that the improper remarks may have been the cause of a larger verdict than was rendered. It must affirmatively appear that the improper remarks actually did cause the rendition of an excessive verdict. If the provisions of Rule 62-*a* do not mean this, then they are meaningless. We think if the court will consider the question again from the standpoint just urged, it will not adhere to its ruling requiring appellee to remit any part of the judgment in his favor. The amount taken from the appellee is one-third of his judgment, an extreme penalty, it

seems, to pay for an error which only goes to affect the amount of his verdict, and the verdict itself is not condemned as being excessive.

175 When the facts show appellee to have been injured as he is, it does seem remarkable that the court should say that these remarks of appellee's counsel should have affected the verdict fully one-third in amount. It is ascribed to the remarks of appellee's counsel a potentiality not justified by all the circumstances in this case. In this case there really was but one question, according to the view of the law taken by the lower court, and which has been affirmed by this court, and that was the extent of appellee's injuries and the amount of compensation to which he was entitled. To say that the jury were governed, in rendering the verdict they did, by a consideration of the remarks of appellee's counsel rather than by the facts of the case, is to do the jury trying the case, it seems to us, great injustice. It must be remembered that the remarks of appellee's counsel stated the law of this land.

It is true that should a jury give an excessive verdict, it is the duty of the trial court, and of the appellate court if the trial court should fail to act, to reduce the verdict to what is the proper amount. It is also equally as true that should the jury fail to award an adequate compensation that there is no power on earth to add one penny to their verdict.

How it can be said then that it was error for counsel to state to the jury the statutory law of the land, which is the public policy of the land, is one of those inscrutable things that is past the comprehension of the ordinary man.

The court says in its opinion, "The language is decidedly improper and should have been rebuked by the court. Using the expression 'under the pleadings and the evidence' did not eradicate the poison that was injected by the appeal to place the responsibility of the amount of the verdict on the trial judge."

176 We do not think the language used is susceptible to the construction that the court places on it. But even if it was, we dissent most vigorously from the conclusion that the language was improper. We repeat again that the remarks used stated the law of this land, and to say that to state the law of the land to the jury is to poison the minds of the jury seems to us to involve a palpable paradox.

If counsel for appellee had stated some fact which of itself was calculated to arouse the passions of the jury, or if he had stated some evidential fact tending to support appellee's theory of his right to recover, it might then be said that such remarks did poison the minds of the jury and influenced them in reaching their conclusion. But where the sole offense, if indeed it is an offense, is to tell the jury nothing but the settled law of the land, we think it is unjustifiable to say that this likewise would poison the minds of the jury and deter them from a discharge of their duty under their oath of office, and to cause them to shirk a responsibility and place it upon the shoulders of some other tribunal.

Appellee is a cripple and will go to his grave in that condition.

The amount of the verdict awarded to him, of itself, is but scant compensation for the injuries he sustained, and he thinks that the court has imposed too great a penalty upon him for the slight offense, from the standpoint of the court, committed by his counsel.

If he must pay a penalty, he urges the court not to make the penalty so extreme.

JOHN SEHORN,
Att'y for Appellee.

Endorsements on motion: Mo. 6193. No. 5206. Court of Civil Appeals. San Antonio & Aransas Pass Railway Company, Appellant, vs. William Wagner, Appellee. Appellee's Motion for a Rehearing. Filed in the Court of Civil Appeals at San Antonio, Texas, Mar. 19, 1914. Jos. Murray, Clerk. (Filed in Supreme Court May 23, 1914. F. T. Connerly, Clerk.)

177 *Opinion of Court of Civil Appeals on Motion for Rehearing.*

(Filed April 22, 1914.)

No. 5206.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY, Appellant,
vs.
WILLIAM WAGNER, Appellee.

On Motion for Rehearing.

Appellant states its inability to find any fact or facts showing any act of negligence on its part which created a necessity for appellee placing his foot between the engine and the car in order to couple it. Appellee swore to the necessity, and appellant, in its brief, seeks to justify its failure to have the coupler arranged so that it could be coupled from the outside by the claim that appellee should have stopped the engine, made the adjustment and then started it up again. The courts do not seem to agree with the contention of appellant. But it is held that the safety appliance act is violated if "in order to open the knuckle when preparing the coupler for use it was reasonably necessary for a man to place part of his body, his arm, or his leg in a hazardous position". United States v. Railway, 167 Fed. 695. If the law was violated by appellant, as in effect is admitted, then no matter how guilty of contributory negligence appellee may have been appellant is liable. "The statute concerning the coupling devices requires that the automatic coupler in use must be operative for each car as to the device of that particular car, so that an employee of a railroad company would not have to go to another car to make the uncoupling of the car in
178 question." United States v. Railway, 168 Fed. 1; U. S. v. Railway, 162 Fed. 403. It is not contended that the locomotive had any device on the outside by which its coupler could be

regulated, the only claim being that appellee should have stopped the engine in order to adjust the coupler of the car. The statute of the United States provides: "That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation *of* such person or corporation so operating such railroad of any statute for the safety of employees contributed to the injury or death of such employee". The statute is too plain to require construction. If appellant did not have the coupler on its engine so arranged that it could be adjusted from the outside, it violated the law and it does not matter what appellee may have done if the defective coupler contributed to his injury, and appellant is liable. Thornton, Safety Appliance Act, §222; Johnson v. Railway, 178 Fed. 643; Mondou v. Railway, 223 U. S. 1, at p. 49. As said by the Supreme Court in Railway v. Taylor, 210 U. S. 281: "If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibition of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

By the Act of 1908, Congress made the doctrine of comparative negligence applicable to all cases based on the negligence of the railroad and contributory negligence of the injured party, except in cases where the injury is inflicted, or the death caused through a violation of the safety appliance act. In the last class of cases the defense of contributory negligence is wholly abolished. Richey, Fed. Employers' Liability Act, p. 39; Horton v. Railroad (N. C.) 73 S. E. 958. The same rule applies to assumed risk and authorities on that subject are also authorities on the question of contributory negligence. Freeman vs. Powell, (Tex. Civ. App.) 144 S.
179 W. 1033: Colasurdo v. Central R. R. Company, 180 Fed. 832 and 192 Fed. 901.

It was not shown that there was a hand lever on the engine and therefore appellee could not see it, and using the hand lever on the car to which the engine was to be coupled, if there was such lever, would not have adjusted the defective coupler on the engine. It may have been contributory negligence for him to kick the defective knuckle, but that would not be a defense, because the defective coupling on the engine contributed to the injury.

Excerpts are made from what is denominated the "Stenographer's Transcript", but no such document has been filed in this court, or will be filed in it. This cause has been considered on the agreed statement of facts, approved by the trial judge, and the effect of such statement of facts cannot be impaired or destroyed by a document not filed among the papers, and which has no place among the papers. The statement of facts bears out the statement of this court that appellant was permitted to introduce all the testimony it desired on the subject of the coupler on the engine. The record fails to show that any testimony offered by appellant was withdrawn by the court from the jury. In the ninth assignment of error it is stated that "the undisputed evidence in this case shows that the coupling apparatus on the car had been adjusted prior to the time of the accident and it was at the time of the accident equipped with

couplers coupling automatically by impact". There is no bill of exception as to any refusal to permit testimony as to the condition of the coupler on the engine. As a matter of fact the engineer testified about the coupler on the engine and the inspector about the coupler on the car. The inspector also stated that the engine and car should have coupled automatically by impact and "if they do not couple with the automatic they are not in proper condition".

And yet in the face of that testimony by one of its own wit-
180 nesses appellant says: "There is not one line of evidence in the record which shows that appellant did not have its cars properly equipped with couplers that would couple by impact; if there be such evidence, we have overlooked it." The evidence of the inspector taken in connection with the uncontroverted evidence that the car and engine did not couple by impact shows that the couplers were not in proper condition. Appellee also swore that the coupler on the engine was not in proper condition. He fixed the coupler on the car which was also out of order and in attempting to fix the coupler on the car he fell and was injured. The evidence is ample to show that the couplers were not in repair.

The petition alleged "that the defendant was negligent in having and permitting the couplers on said engine and car to be so that they would not couple automatically as required by law" and that was sufficient to charge a failure to comply with the Safety Appliance Act. A failure to have couplers that would couple automatically by impact was a violation of law and was negligence per se.

The Congress of the United States and not the courts have passed the law that "effectually ties the hands of every carrier in the State". Our construction of the law may be a harsh one but, as said by the Supreme Court in the Taylor case hereinbefore cited: "It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the law-making body."

It is significant that the inspector examined the car to which the engine was to be coupled, but did not inspect the coupler
181 that was responsible for the accident. He testified fully as to the condition of the car coupler but not one word as to the engine. Although the conductor was told by appellee how he was hurt, he made no examination of the locomotive. He said that he left that for the inspector and that employe was not in a position to inspect because the engine had been sent off. Appellant did not offer to show that the coupler on the engine could have been adjusted from the side, but virtually admits that it could not have been adjusted except by stopping it. Pulling a lever on the car would not have fixed the defective coupler on the engine. It was the latter that was out of adjustment and pulling the hand-levers of all the cars in the train would not have adjusted the engine coupler. The evidence showed that it could not be adjusted except by a man going between it and the car.

Appellant quotes largely in its brief from cases which arose before

the law as to contributory negligence was enacted. The cases cited by appellant in its motion have no bearing on this case. In Southern Ry. Co. v. Snyder, 205 Fed. 868, it is distinctly held that the accident occurred before the act of 1908. That act absolutely removes contributory negligence as a defense in cases of injuries arising from defective safety appliances provided for in the employers' liability act.

The petition alleged that appellant was engaged in interstate and intra-state commerce and that it "used on said railroad in interstate commerce and intrastate commerce a certain engine and a certain car; and it became and was the duty of plaintiff then and there to couple the aforesaid engine and car together." The allegation was sufficient to show that appellant was engaged in interstate commerce.

In connection with the claim that there was no allegation as to defect in the couplers that brought them within the scope of the statute we copy the following from the petition: "Plaintiff
182 avers that the coupler attached to said engine and car would not couple automatically by impact, as required by law; and for the purpose of making said coupling it became necessary for plaintiff to stand upon the foot-board of said engine, between said engine and car, and to shove the knuckle of the coupler on said engine so as to make the coupling as aforesaid."

The motion for rehearing is overruled.

W. S. FLY,
Chief Justice.

Opinion delivered and filed April 22, 1914.

Endorsements on opinion: No. 5206. In Court of Civil Appeals, Fourth Supreme Judicial District of Texas, San Antonio. San Antonio & Aransas Pass Railway Co., Appellant, vs. William Wagner, Appellee. From Bexar County. Opinion on Motion for Rehearing, by W. S. Fly, Chief Justice. Overruled. Filed in the Court of Civil Appeals at San Antonio, Texas, Apr. 22, 1914. Jos. Murray, Clerk. (Filed in Supreme Court May 23, 1914. F. T. Connerly, Clerk.)

183 *Order of Court on Appellant's Motion for Rehearing.*

No. 5206.

S. A. & A. P. Ry. Co., Appellant,
vs.
William Wagner, Appellee.

Appeal from Bexar.

Wednesday, April 22nd, A. D. 1914.

The motion of appellant for a rehearing, filed March 19, 1914, coming on to be heard and the Court having duly considered the same, it is ordered that said motion be and is hereby overruled; that

appellant, San Antonio & Aransas Pass Railway Company, and its surety, U. S. Fidelity & Deposit & Guaranty Company, pay all costs of this motion.

Order of Court on Appellee's Motion for Rehearing.

No. 5206.

S. A. & A. P. Ry. Co., Appellant,
vs.
William Wagner, Appellee.

Appeal from Bexar.

Wednesday, April 22nd, A. D. 1914.

The motion of appellee for a rehearing, filed March 19, 1914, coming on to be heard, and the Court having duly considered the same, it is ordered that said motion be and is hereby overruled; that appellee, Wm. Wagner, pay all costs of this motion.

184 *Application for Writ of Error.*

In the Supreme Court of Texas.

No. 8867.

San Antonio & Aransas Pass Railway Company, Plaintiff in Error,
vs.
William Wagner, Defendant in Error.

Application of San Antonio & Aransas Pass Railway Company for Writ of Error.

To the Supreme Court of Texas:

Before proceeding to the questions raised and issue involved in this case, we wish to assume the liberty of calling the Court's attention to the fact that the main contention of plaintiff in error in this cause, has never been considered, or passed upon, so far as we have been able to discover, by any court of last resort, either Federal or State, and, therefore, is what is commonly termed a case of first impression. The Questions involved require the construction of the Federal Safety Appliance Act of March 2, 1893, and the Federal Em-
ployer's Liability Act of April 22, 1908, in their applica-
185 tion respectively to peculiar phases involving questions of law heretofore undetermined by any final court. For this reason we ask the indulgence of this court for the precautionary suggestion we have made.

Preliminary Statement.

This suit was instituted by William Wagner, defendant in error (herein called plaintiff) in the District Court of Bexar County, 57th. Judicial District of Texas, on March 12, 1912, and by amended petition thereafter filed, it was alleged, substantially as follows:

That on or about the 18th day of October, 1911, plaintiff was in the employ of defendant (plaintiff in error here), as a brakeman; that defendant on said date was a common carrier by railroad "engaged in both interstate and intrastate commerce"; that at a certain station on its line of railway, on said date "the defendant then and there used on said railroad in interstate commerce and in intrastate commerce a certain engine and a certain car; and it became and was the duty of plaintiff then and there to couple the aforesaid engine and car together. Plaintiff avers that the couplers attached to said engine and car would not couple automatically by impact, as required by law; and for the purpose of making said coupling it became necessary for plaintiff to stand upon the footboard of said engine, between said engine and car, and to shove the knuckle of the coupler on said engine so as to bring it into proper position to make the coupling as aforesaid, etc." whereby he received the injuries alleged. (Tr. p. 1.)

Plaintiff further alleged that the defendant "was negligent in having and permitting the couplers on said engine and car
186 to be so that they would not couple automatically by impact, as required by law; and that this negligence of the defendant was the direct cause of plaintiff's said injuries." (Tr. p. 2.)

Defendant for answer excepted generally to the sufficiency of said petition, and entered three special exceptions to the same; (1), because it did not appear therefrom whether defendant railway company, or the plaintiff was engaged at the time of the alleged injuries in interstate commerce, or whether plaintiff sought relief under the State or Federal Law; (2) because it did not appear from said petition that said engine and car were not equipped with couplers coupling automatically by impact in accordance with the requirements of both State and Federal Law; and (3) because there was no allegation in said petition of any defect in the couplers as constructed or maintained as would charge defendant with a violation of either the State or Federal law, only stating the conclusion of the pleader that the couplers would not couple automatically by impact as required by law. (Tr. p. 4.)

Defendant further answered by general denial, and for special answer and defense pleaded the Federal Safety Appliance Act of March 2, 1893, as amended March 2, 1903; that said engine and cars were equipped as provided by law; that said couplers by reason of necessary lateral motion to make engine and cars to round curves, needed adjustment at times before they would couple by impact; that there was no necessity for plaintiff to go between moving engine and cars or kicking the coupling with his feet while said engine

was in motion or endangering his personal safety in any way; that said cars and engine at the time of injury were engaged
187 in interstate commerce; that there was no defect in the coupling apparatus on its engine or cars at the time of plaintiff's injuries, and that his injuries resulted from negligence and contributory negligence and not from any negligence on the part of defendant. (Tr. p. 5-8.)

Plaintiff filed a special exception to all that part of defendant's answer following the general denial (Tr. p. 8), which was sustained by the court, and exception taken by defendant to the court's ruling, (Tr. p. 9.)

The record does not reflect that any action was taken on the general and special exceptions of defendant to plaintiff's petition, the action of the court in striking out defendant's special answer being regarded as overruling said exceptions.

The cause was tried by a jury and resulted in a verdict and judgment for plaintiff, (Tr. p. 20), which on appeal was affirmed by the Court of Civil Appeals on March 4, 1914, and rehearing denied to appellant (plaintiff in error here) on April 22, 1914, and the cause is now before this court on petition for writ of error. (See Appellant's Brief, pp. 1-6.)

Grounds of Jurisdiction.

1st. The Court of Civil Appeals has erroneously held that the defendant was guilty of negligence per se in having and permitting the coup rs on the engine and car in question to be so that they would no couple automatically by impact, as required by law, without any evidence in the record tending to indicate that the position or condition of the drawbar or couplers on either engine or cars were caused by any negligence of the defendant, the evidence showing that the same were caused by the acts and conduct of
188 plaintiff himself there being neither pleading nor proof stating definitely how the defendant "permitted" the alleged negligence complained of.

2nd. The Court of Civil Appeals erroneously sustained the action of the trial court in striking out defendant's special answer and defenses and denying to defendant the right to submit its evidence in support of the same, thereby holding defendant guilty of negligence as a matter of law, in that the couplers would not couple automatically by impact; the same being a question of fact and should have been submitted to the jury.

3rd. The Court of Civil Appeals erroneously sustained the action of the trial court in striking out the plea of contributory negligence by defendant on the part of plaintiff, and in erroneously declaring the substantive law in the case in construing the Federal Employers' Liability Act of April 22, 1908, and the Safety Appliance Act of March 2, 1893, in connection therewith as abolishing said plea, in that the court held in striking out said defenses that defendant had violated the said Safety Appliance Act as a matter of law with-

out first submitting the question to the jury or inviting any evidence thereon; which action of the court is fundamental error, for the reason that before the court may take a case from the jury, the evidence, taken in the light most favorable to the plaintiff must exclude the conclusion that the violation of the Safety Appliance Act contributed to the injury, and even in a case of an injury in attempting to make a coupling with a defective coupler, contributory negligence is available to the defense in diminution of damages in an action where the plaintiff's negligence was the sole cause of the injury. It was defendant's contention that there was no defective coupler and no contribution on its part toward plaintiff's
189 injury; the question should have been submitted to the jury for determination. It was further contended by defendant in its specific answer, stricken out by the court, that in making said coupling there was no necessity in plaintiff kicking the same with his foot and that he was negligent in so doing and that such negligence was the sole cause of his injury. Plaintiff in error contends that the trial court erred in taking the question of contributory negligence from the jury and deciding ipso facto, without the fact being established by proof, that defendant was guilty of negligence, which negligence was solely and directly responsible for plaintiff's injuries.

This ruling, involves the substantive law in the case, in that there was neither allegation nor proof of any defect or lack of repair in the coupler on either the engine or car, nor was there any allegation or proof that either engine or car was not properly equipped with automatic couplers; the allegation being that the defendant was negligent in having and permitting the couplers to be so they would not couple automatically by impact, there being no evidence whatever that the defendant was responsible for said couplers "being so" they would not couple automatically by impact, and defendant sought to prove under its special defenses stricken out by the court, that plaintiff was responsible for such condition, which was an allegation of fact and the defendant should have been permitted to offer proof in substantiation of the same.

4th. The Court of Civil Appeals has erroneously held that if the appellant did not have the coupler on its engine so arranged that it could be adjusted from the outside, it violated the law and it does not matter what appellee may have done; if the defective coupler contributed to his injury, appellant was liable; for the reason that it cannot be assumed in the absence of evidence
190 that defendant has violated the law, there being no evidence whatever, as shown by the record, that the defendant did not have such coupler so arranged that it could be adjusted from the outside, and therefore, it could not be held, as a matter of law, guilty of having violated the statute requiring couplers that can be coupled automatically without the necessity of men going between the ends of the cars.

Defendant pleaded, and tendered the proof, that its cars and engine were properly equipped as per statutory requirement, that

said couplers would couple automatically by impact when properly adjusted, and offered to prove that this adjustment should have been made by means of the lever from the outside of the car, which defense and proof were denied by the ruling of the court.

5th. The Court of Civil Appeals erroneously held that the Federal Employers' Act of 1908 wholly abolished the defense of contributory negligence in cases where injury is inflicted through a violation of the Federal Safety Appliance Act and wholly preventing the defense of contributory negligence, even in diminution of damages in proportion to the amount of negligence attributable to the plaintiff by sustaining the action of the trial court in refusing to submit same to the jury.

6th. The Court of Civil Appeals erroneously held and assumed that plaintiff in error did not have the coupler on its engine so arranged that it could be adjusted from the outside and thereby violated the law, for the reason there is no evidence in the record to sustain such assumption, there being no testimony whatever with reference to hand-lever or any other arrangements by which adjustment could be made from the outside, this matter of adjustment by such means and the necessary evidence to support the same being denied the defendant below, by the trial court ruling
191 that no adjustment was permitted under the Federal Safety Appliance Act, which ruling was sustained by the Court of Civil Appeals.

7th. The Court of Civil Appeals has erroneously held that the lateral play to the drawbar of an engine and cars made necessary for the purpose of rounding curves to which all automatic couplers are attached and which required adjustment at times, is a defect and a violation of the Federal Appliance Act, and is therefore negligence per se; that no adjustment is permitted under said Act; and by sustaining the action of the trial court in striking out the special answer of defendant below and denying to said defendant the introduction of any and all evidence offered to sustain said defense, the Court of Civil Appeals has committed reversible error.

8th. The Court of Civil Appeals has erroneously held that the lateral play in the drawbar of said engine and the necessary adjustment of the same at the time of the injuries to the plaintiff, and in further holding as a matter of record that defendant in its stricken pleadings admitted it was necessary to go between said engine and said car to make such adjustment; for the reason that defendant nowhere admitted that it was necessary for plaintiff to go between said engine and car to adjust said coupler, the limit of admission only being that plaintiff could have avoided his injuries by stopping the engine and making the adjustment before the immediate impact, and that it was negligence on the part of plaintiff to kick said drawbar or coupler with his foot, and that said negligence was the sole cause of his injuries.

9th. The Court of Civil Appeals has erroneously held
192 that the Federal Statute concerning the coupling devices requires that the automatic coupler in use must be operative for each car as to the device of that particular car, so that an em-

ploye of a railroad company would not have to go to another car to make the coupling of the car in question; for the reason that said Safety Appliance Act only requires that each car must itself be completely equipped with couplers coupling automatically by impact, no requirements being specified as to operative devices of each particular car or otherwise, and such construction by said court imposes an additional burden upon plaintiff in error not required by the staatute nor contemplated by any of its provisions.

10th. The Court of Civil Appeals has erroneously held that "it was not shown that there was a hand lever on the engine and therefore appellee could not use it, and using the hand lever on the car to which the engine was to be coupled, if there was such lever, would not have adjusted the defective coupler on the engine. It may have been contributory negligence for him to kick the defective knuckle, but that would not be a defense because the defective coupling on the engine contributed to the injury," for the reason that the record shows there was no evidence whatever that there was or was not any hand lever on either engine or car; and it was error for the court to assume that there was not, and because the trial court held, and which ruling was sustained by the Court of Civil Appeals, that no adjustment was permitted by the Safety Appliance Act and the pleading of defendant in the trial court setting up the necessity of adjustment was stricken out and no evidence was permitted to be introduced on the question of adjustment; the Court of Civil Appeals thereby erroneously as-
193 suming a condition as being admitted because not controverted when defendant was not permitted to controvert the same, the court thereby basing its judgment directly upon the condition it had itself created as a matter of law and holding defendant liable for such condition.

11th. The Court of Civil Appeals erroneously held that the Safety Appliance Act was violated if in preparing a coupler for use it was reasonably necessary for a man to place part of his body, arm or leg, in a hazardous position; while the law as construed by the Federal Court, declares the same violated when the coupling apparatus was so constructed that in preparing a coupler for use, it was reasonably necessary for a man to place some part of his body, in a hazardous position, the defect in the construction creating the necessity for preparation for use by assuming a hazardous position. There being no evidence in the record of any defect in construction or any evidence creating the necessity for plaintiff to go between the cars or kick the coupler with his foot, the court erroneously held that the fact that he did so conclusively showed that the statute was violated and defendant was liable.

12th. The Court of Civil Appeals erroneously held that the allegation of plaintiff that "defendant used on said railroad in interstate commerce and intrastate commerce a certain engine and a certain car; and it became and was the duty of plaintiff then and theere to couple the aforesaid engine and car togetheer," was sufficient to show that defendant was engaged in intrastate commerce at the time of the accident. There is no allegation in the petition that at the time of the injury either the plaintiff or defendant was engaged in in-

terstate commerce, which defect in said petition was specially excepted to by the defendant and same was overruled by the
194 trial court. This was fundamental error for the reason that in order to obtain the benefit of the Federal Employers' Liability Act eliminating the defense of contributory negligence it must be alleged in the petition and established on the trial that defendant was engaged in interstate commerce, and that plaintiff was employed by defendant in such commerce, and was injured while so employed.

13th. The Court of Civil Appeals erroneously declared the substantive law in the case by holding, as a matter of law, that the defective coupler on the engine contributed to the injury, for the reason that there was no evidence in the case that the coupler was defective, the court holding that the position of the drawbar disclosed a defect, while plaintiff's own testimony as shown by the record, evidenced the fact that plaintiff's negligence alone was the cause of the drawbar being out of alignment, he having failed to use the lever on the side of the car for the purpose of adjusting the knuckle of the coupler on the car prior to the first impact, which act of negligence was the direct cause of failure to couple and produced the misalignment of the drawbar, in the kicking of which with his foot, he suffered the injuries complained of.

First Assignment of Error.

The Court of Civil Appeals erred in overruling appellant's first assignment of error, found on page 6 of its brief, which read- as follows:

"The Court erred in sustaining the general demurrer of plaintiff contained in his first supplemental petition to all that part of defendant's first amended original answer other than the general denial and striking out of said answer all of the defenses therein set up except the general denial, as shown by the court's order
195 sustaining said demurrer, and as shown by defendant's Bill of Exceptions Number One, because the allegations in said answer other than the general denial set up and alleged proper defenses to plaintiff's cause of action, and defendant should have been permitted to sustain such defense by proof." (Tr. pp. 8-9.)

Proposition.

By striking out the special answer of defendant, the Court commtited a manifest error and restricted the defense of defendant to the precise facts alleged by the plaintiff and limited its evidence to such proofs only as directly negatived the allegations of plaintiff's petition, thereby prohibiting defendant from putting in issue any matters of defense not raised by plaintiff in his petition and arbitrarily precluding it from pleading as many several matters, whether of law or fact as it thought necessary for its defense and pertinent to the case which is accorded it by the general rules of pleading and the statutes of the state.

Statement.

Defendant averred in its special answer stricken out by the Court, as follows:

"That all couplers attached to railroad engines, tenders or cars must be provided with sufficient lateral motion to enable engines, cars and trains coupled together to round curves while being moved over railway tracks, and with adjustable knuckles which can be opened and closed, and such couplers must be adjusted at times so that they will couple automatically by impact, and that there is no character or kind of automatic coupler con-
196 structed, or that can be constructed which will couple automatically at all times without previous adjustment, by reason of the lateral play necessary, as aforesaid, to enable coupled cars to round curves, and by reason of such adjustable knuckles necessary to couple and uncouple cars automatically by impact, and said couplers could and should have been adjusted by plaintiff only after bringing said engine and said cars to a standstill and going between the ends of the cars and there was no necessity for plaintiff to go between moving engine and cars for kicking said coupler over with his foot, while said engine was in motion or endangering his own personal safety in any way; and the Acts of Congress aforesaid do not require that said automatic couplers shall be of such construction that they will couple automatically by impact at all times without any adjustment of the couplers. (Tr. pp. 5-6.)

"That the work of adjusting said couplers to couple automatically by impact, could have been done by plaintiff or any other person with perfect safety to himself and without any danger or risk of injury by going between the engine and car while standing, but that the plaintiff negligently, recklessly, and carelessly sought to adjust the coupler of said engine and cars while the engine was moving upon and close to the car to which it was sought to be coupled by kicking the coupler with his foot immediately before the engine and car came in contact, and that he slipped or fell or stumbled while standing on the footboard of the engine with one foot and undertaking to kick the coupler apparatus with the other foot, negligently and recklessly and in utter disregard of his personal safety, and his foot caught between the coupling devices on the engine and car, and his injuries resulted therefrom and not from any negligence on the part of the defendant or any violation of law on its part." (Tr. p. 7.)

197 All of which defenses were denied to defendant by the Court in striking out said answer. (Tr. p. 9.)

Authorities.

See authorities, page 13, appellant's brief.

Argument.

See argument, page 13, appellant's brief.

Second Assignment of Error.

The Court of Civil Appeals erred in holding that appellant was negligent in having and permitting the couplers on said engines and car to be so that they would not couple automatically as required by law, and that was sufficient to charge a failure to comply with the Safety Appliance Act; that a failure to have couplers that would couple automatically by impact was a violation of law and was negligence per se. (Opinion on motion for rehearing, page 4, top page.)

Proposition.

There being neither allegation nor proof on the part of plaintiff, of any defect or lack of repair in the automatic couplers, the fact that the drawbar of the engine was out of alignment, the same being caused by plaintiff's own negligence, as shown by the record, constituted no violation of the Safety Appliance Act on the part of defendant, or that such position of the drawbar constituted negligence per se; the cause of such position of the drawbar being a controvertible question of the fact in the case, which
198 should have been submitted to the jury for their determination, and this being denied to defendant by the trial court was reversible error, and the Court of Civil Appeals erroneously sustained such ruling by said trial court.

Statement.

Plaintiff alleged in his petition:

"And plaintiff avers that the defendant was negligent in having and permitting the couplers on said engine and car to be so that they would not couple automatically by impact, as required by law; and that this negligence of the defendant was the direct cause of plaintiff's said injuries." (Tr. p. 2.)

Defendant's third special exception was as follows:

"Specially excepting to said petition defendant says the same is insufficient to charge this defendant with negligence and to put this defendant upon notice and proof, because the same does not set out or allege any defect in the couplers as constructed on said cars nor allege any defects in the maintenance of the couplers on said engine and cars which would charge this defendant with a violation of law, State or Federal, and only states the conclusion

of the pleader that the couplers attached to said engine and cars would not couple automatically by impact as required by law." (Tr. p. 4.)

Which said special exception of defendant was overruled by the Court, and the special answer setting up a defense to said allegations was stricken out on exception by plaintiff. (Tr. p. 9.)

The Order of the Court sustaining plaintiff's demurrer was as follows:

199 "April 30, 1913.—This day came on to be heard plaintiff's demurrer to all that part of defendant's first amended original answer, following the general denial, contained in Plaintiff's First Supplemental Petition, filed herein April 30, 1913, and the Court having heard argument thereon is of the opinion that said demurrer should be sustained.

"It is therefore ordered that plaintiff's demurrer contained in his First Supplemental Petition following the general denial be and the same is sustained by the Court and all of defendant's First Amended Original Answer following the general denial be and the same is stricken out of said answer; to which action and ruling of the Court defendant then and there in open court excepted." (Tr. p. 9.)

Third Assignment of Error.

(Fourth in Transcript.)

The court erred in sustaining the general demurrer of plaintiff contained in his First Supplemental Petition to all that part of defendant's First Amended Original Answer other than the general denial, and striking out of said answer all of the defenses therein set up except the general denial, as shown by the Court's order sustaining said demurrer, and as shown by defendant's Bill of Exception Number One, because defendant was entitled to prove that the automatic couplers on defendant's engine and cars with which plaintiff was working were required to have lateral play to enable them to round curves, and adjustable knuckles which could be opened and closed, and that it was necessary to adjust said couplers before they would couple automatically by impact, and that there was no necessity for plaintiff going between the engine and cars while in motion, or in any manner endangering his

200 personal safety to make such adjustment, and on the contrary, he was prohibited from so doing by the rules and regulations of this defendant, and that he negligently, recklessly and carelessly, in utter disregard of his own personal safety and defendant's rules, as aforesaid, stood upon the footboard of defendant's engine, and waited until said engine was about to come in contact with the car with which it was to be coupled, and then sought to kick said coupler into proper adjustment with his foot, and slipped, stumbled or fell while in the act of so doing, and caught his foot between the coupling apparatus of said engine and car, because such pleading and proof would establish the defense

that the coupling apparatus with which plaintiff was working met the requirements of the law, and that his injuries resulted from his own negligence and contributory negligence.

Proposition.

Where defendant sets up by special answer that its automatic couplers on engine and cars with which plaintiff was working at the time of the injury were required to have lateral play to enable them to round curves, and it was necessary to adjust said couplers before they would couple automatically by impact, and there was no necessity for plaintiff to go between said engine and cars while in motion, or in any manner endanger his personal safety to make such adjustment, and he was prohibited from doing so by the rules of defendant, but in disregard of said rules and of his own personal safety, defendant negligently, recklessly and carelessly went between said engine and car and stood upon the footboard of said engine and waited until said engine came in contact with said car, then endeavored to kick said couplers into proper adjustment with his foot, and while employed in such act slipped and fell and caught his foot between said coupling apparatus of said
201 engine and car thereby causing the injuries complained of and that same resulted from his own negligence and contributory negligence; such defenses set up questions of fact which should have been submitted to the jury; and it was manifest error for the Court to strike out said answer and said defenses, thereby denying to defendant its legal right to make all the defenses it deemed necessary and proper to relieve it of its alleged liability, and denied to defendant its legal right to have such defenses and requisite proof to sustain the same submitted to the jury for their determination, as required by law.

Statement.

Plaintiff alleged in his petition:

"That for the purpose of making said coupling it became necessary for plaintiff to stand upon the footboard of said engine between said engine and car, and to shove the knuckle of the coupler of said engine so as to bring it into proper position to make the coupling as aforesaid. And plaintiff says that he placed his left foot against the knuckle of the coupler of the engine for the purpose of shoving said knuckle into position so as to make said coupling, etc.

Plaintiff testified:

"I kicked the drawbar of the locomotive to shove it over; it was swung over to my side. The drawbar was out of line and wouldn't couple. I couldn't find out whether there was anything else the matter with it—I couldn't find nothing. When I kicked that drawbar, I kicked for the purpose of lining it up with the drawbar of the car, that was the only reason I kicked it. When

I came back to make the first coupling the knuckle pin on the
202 car didn't drop. When this knuckle pin failed to drop, I then gave the engineer the signal to slack ahead. I didn't do anything at all to the drawhead of the box car before I gave the signal to slack ahead. I then stepped off the footboard and went down to fix this knuckle, closed the knuckle and dropped the pin with my hand—shook it a little and it fell down. I then walked half way to the engine and gave the sign to back up. I did not see the drawbar on the engine right then—I came up towards the engine and gave the backup sign; he backed up before I got to the engine, and I got on the footboard, and I seen the drawhead way over this way, and I reached up with my left foot to shove it, and when I did my right foot slipped on the footboard. When I got ready to shove it over I put my foot right out on the knuckle, right back of the knuckle of the drawhead to shove it over, and as I put the pressure on the drawhead with my foot the other foot slipped. (S. F. pp. 6-7.)

"When the cars came together and I failed to make that coupling, I didn't notice anything wrong with the coupler on the engine at all; it was all with the other. Now, when they came together that way, and do not make a coupling, sometimes that throws the drawbar out of line and sometimes it doesn't; it hit center in the coupling and the knuckle closed all right, but the pin wouldn't drop. When I pulled away to make the second coupling, I never noticed the drawbar of the engine at that time. Before I made the first attempt at coupling I did not notice the drawhead of the engine—I just went down there and naturally supposed it would couple. I was riding on the footboard at the time. I did not look at that time to see whether the drawbar of the engine was straight
203 or out of line, but it must have been straight or they wouldn't have come together, wouldn't have coupled. (S. F. p. 8) I was kicking the coupler of the drawhead of the engine instead of the coupler of the drawhead of the car at the time of the accident. (S. F. p. 9.)

"When the brakeman couples a car, he pulls a lever on the outside of the car, that opens the knuckle—that raises the pin and opens the coupler up, then all he has to do is to give a signal and they back right up. He has nothing to do with reference to fixing the knuckle or anything of the sort. (S. F. p. 12.)

Authorities.

Morriss vs. Ry., 158 S. W., 1055, Sixth Court of Civil Appeals, and parallel cases;
Grand Trunk, etc. Ry. vs. Lindsey, 201 Fed. 836;
Louisville, etc. Ry. vs. Wene, 202 Fed. 887;
Smith vs. Ry., 210 Fed. 761;
Atchison, etc. Ry. vs. Hines, 211 Fed. 264 (important case.)

Fourth Assignment of Error.

The Court of Civil Appeals erred in holding that if the law was violated by the appellant, as in effect is admitted, and if the appellant did not have the coupler on its engine so arranged that it could be adjusted from the outside, it violated the law, and it does not matter what appellee may have done, if the defective coupler contributed to his injury appellant was liable; (Opinion Motion for Rehearing, pp. 1, 2) for the reason that violations of law are not based upon such violent presumptions, and it cannot be presumed in the absence of evidence that a defendant has violated the law, there being no evidence that the coupler on the engine was not so arranged
204 that it could be adjusted from the outside, and this was immaterial from the standpoint of the defendant which contended and offered to prove that the drawbar of the engine was out of alignment by reason of the negligence of the plaintiff failing and refusing to use the hand lever on the side of the car prior to the first impact, which negligence was the proximate cause of his injuries.

Proposition.

The foregoing assignment is submitted as a proposition.

Statement.

Plaintiff testified:

"I came out of the house track on the hind end footboard, on the footboard of the engine, to couple into these two cars, and the coupling wouldn't make; I coupled up against them, but it wouldn't make. I started the engine ahead, and closed the knuckle and dropped the pin with my hand, on the box car; I gave the engineer a backup signed to couple in again, and I got back on the footboard of the engine; when I got on the footboard I looked down and seen the drawhead on the engine was shifted over to my side, and I reached up with my left foot to shift the drawhead over so it would couple, and my left foot slipped," etc. (S. F. p. 2.)

"When I took the engine up to couple *u*nto these two cars, the coupling wouldn't make, because the pin wouldn't drop; they are supposed to couple without a man going in between to couple them with his hands or feet, or having anything at all to do with the coupling." (S. F. p. 3.)

Again:

"When the brakeman couples a car he pulls a lever on the outside of the car, that opens the knuckle—that raises the pin and opens the coupler up, then all he has to do is to give a signal and they back right up. He has nothing to do with reference to fixing the knuckles or anything of that sort." (S. F. p. 12.)

205 *Fifth Assignment of Error.*

(Fourth in Appellant's Motion for Rehearing.)

The Court of Civil Appeals erred in sustaining the action of the trial court in striking out defendant's plea of contributory negligence and refusing to submit the same to the jury as a question of fact to be determined by the evidence, and in refusing to submit the same in its charge to the jury in diminution of damages, as required under Section 3 of the Federal Employers' Liability Act of 1908.

Proposition.

The foregoing assignment is submitted as a proposition.

Statement.

The court charged the jury as follows:

I.

"If you find from the evidence that at the time of the accident the defendant's locomotive and car to which it was attempting to couple the locomotive were not equipped with couplers coupling automatically by impact, without the necessity of plaintiff's going between the ends of the cars; and if you further find from the evidence that by reason of such fact (if found by you) and as the proximate result thereof, the plaintiff received any of the injuries complained of by *you,* (him) you will find for the plaintiff."

II.

"If you find from the evidence that said locomotive and car of defendant, at the time of the accident, were equipped with couplers coupling automatically by impact, without the necessity of plaintiff's going between the ends of the cars, you will find for
206 the defendant."

III.

If you find for the plaintiff and believe from the evidence that he sustained any of the injuries alleged in his petition, then you should allow him such sum as you believe from the evidence will fully compensate him for the injuries received, if any, etc. (Appellant's Brief, p. 28.)

Section 3 of the Federal Safety Appliance Act of 1908 reads as follows:

"SEC. 3. That in all actions hereafter brought against any such common carrier, by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact

that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; provided, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."

Authorities.

Contributory Negligence.

Atchison, etc. Ry. Co. vs. Hines, 211 Fed. 264 (important case.)
Smith vs. Ry. Co., 210 Fed. 761;
Louisville, etc. Ry. vs. Wene, 202 Fed. 887;
Grand Trunk etc. Ry. Co. vs. Lindsey, 201 Fed. 836.

Sixth Assignment of Error.

The Court of Civil Appeals erred in holding that the lateral play to the drawbar of the engine made necessary for the purpose
207 of rounding curves which requires adjustment at times in order to couple, is a defect and a violation of the Federal Safety Appliance Act, and, therefore, when out of alignment is negligence per se, and that no adjustment is permitted under said Act; and in striking out the special answer of defendant and denying the introduction of all evidence as to the necessary adjustment of the couplers at times, and in sustaining the action of the trial court therein, said Court of Civil Appeals committed reversible error.

Proposition.

Above submitted as a proposition.

Statement.

See Statement under Second Assignment of Error.

Seventh Assignment of Error.

The Court of Civil Appeals has erroneously declared the substantive law in the case by holding that the Federal Safety Appliance Act requires that the coupling devices in use must be operative for each car, as to the device of that particular car, so that an employe of a railroad company would not have to go to another car to make the uncoupling of the car; for the reason that the Safety Appliance Act only requires that each car must itself be completely equipped with couplers coupling automatically by impact, no requirement being provided that operative devices of each car must

be operative as to that particular car, and such construction of the statute by said Court imposes an additional and unauthorized burden upon plaintiff in error not required by the statute nor contemplated by any of its provisions.

208 *Proposition.*

The above is submitted as a proposition.

Statement.

The opinion of the court of Civil Appeals on motion for rehearing by appellant reads, under quotation:

"The statute concerning the coupling devices requires that the automatic coupler in use must be operative for each car as to the device of that particular car, so that any employe of a railroad company would not have to go to another car to make the uncoupling of the car in question. United States vs. Railway, 168 Fed. 1; U. S. vs. Railway, 162 Fed. 403." (Opinion, p. 1).

The nearest approach to this language discoverable is found in 168 Fed., p. 5, where the opinion reads:

"Under the act each car is a unit and must itself be completely equipped so that trainmen may go about their work without charging their memories with differences between cars."

The Court further said in that case:

"In our judgment the mode of operation of automatic coupling mechanise and the effect of various conditions thereof were proper subjects for expert testimony.

Eighth Assignment of Error.

The Court of Civil Appeals erroneously declared the substantive law in the case in holding that the Safety Appliance Act was violated if in preparing a coupler for use it was reasonably necessary for a man to place part of his body, arm or leg in a hazardous position; while the statute as construed by the Federal Courts is declared to be violated when the coupling apparatus was so constructed
209 that, in preparing a coupler for use it was reasonably necessary for a man to place some part of his body in a hazardous position. Because it is held that it is the defect in construction and not the position of the appliance, creating the necessity for preparation for use, which violates the statute, the position of the appliance it being possible for the employe to disarrange and therefore being personally responsible for the alleged necessity for going between the ends of the cars, himself negligently creating the necessity by which he afterwards profits under the Employer's Liability Act.

Proposition.

The foregoing is submitted as a proposition.

Statement.

See opinion of Court of Civil Appeals denying appellant's motion for rehearing, page 1.

See U. S. vs. Ry., 167, Fed. 695, from which quotation is made therein.

Ninth Assignment of Error.

The Court of Civil Appeals erred in holding that the allegations of plaintiff that "defendant used in said railroad in interstate commerce and intrastate commerce a certain engine and certain car; and it became and was the duty of plaintiff then and there to couple the aforesaid engine and car together," was sufficient to show that defendant was engaged in interstate commerce at the time of the accident;

210 for the reason that in order for plaintiff to obtain the benefit of the Federal Employers' Act barring the defense of contributory negligence, both plaintiff and defendant must have been engaged in interstate commerce at the time of the accident, and such fact as to both must be specifically alleged in the petition.

Proposition.

The foregoing assignment is submitted as a proposition.

Statement.

Plaintiff in his petition alleged:

"On or about the 18th day of October, 1911, plaintiff was in the employ of the defendant as a brakeman, and on said date the defendant was and still is a common carrier by railroad, engaged in both interstate and intrastate commerce; and on said date, at the station of Kenedy, on the line of defendant railroad, the defendant then and there used on said railroad in interstate commerce and intrastate commerce a certain engine and a certain car; and it became and was the duty of plaintiff then and there to couple the aforesaid engine and car together. Plaintiff avers that the couplers attached to said engine and car would not couple automatically by impact, as required by law." (Tr. p. 1.)

Authorities.

Atchison etc. Ry. vs. Hines, 211 Fed. 268; St. Louis, etc. Ry. vs. Seale, 229 U. S. 156; Pederson vs. Delaware, etc. Ry., 229 U. S. 146.

Argument under First, Second, Third, Fourth, and Sixth Assignments of Error.

211 These assignments go into the fundamental error in the case, denying to the defendant in the trial court all matters either of law or fact it thought necessary for its defense, as

reserved under Art. 1902, Rev. Stat. 1911. The vice in this action of the trial court, and as sustained by the Court of Civil Appeals is, that as soon as defendant enters the judicial forum for the protection of the legal rights and to have its day in Court, judicial hands are immediately laid upon it and its weapons of defense forcibly taken from it, and turned over to the plaintiff, in order that justice may be done. This action was absolutely necessary on the part of the trial court for the purpose of protecting its own position in the case, which necessarily required a pre-judgment of defendant's rights before any evidence was submitted or testimony heard as to certain controversial facts—defendants being adjudged guilty of the wrongs charged as a matter of law.

The purpose of defendant in setting up the several defenses pleaded, was to establish three several facts which it contends relieved it of all liability to plaintiff; (1) That its cars were equipped with all the coupling appliances required by law; (2) That the failure of the coupler to couple automatically by impact, was the failure on the part of plaintiff to adjust the coupler previous to the impact, by using the hand lever on the side or end of the car, placed there for the sole purpose of precluding any necessity for going between the ends of the cars; and (3) that such failure of plaintiff was negligence, and such negligence was the proximate cause of his injuries.

It is undeniable, as a general proposition, that negligence or absence of negligence is a fact and a question to be determined by the jury, and not by the Court, and this is so unless, from the undisputed facts, but one legal deduction can be drawn. In
212 striking out all defenses pleaded by plaintiff in error in the trial, the Court necessarily assumed to decide and did decide, the following facts, as a matter of law:

(*a*) That the engine and car of the defendant were not equipped with couplers that would couple automatically by impact without the necessity of men going between the cars;

(*b*) That a coupler coupling automatically by impact needs no adjustment and same is not permitted by the Safety Appliance Act.

(*c*) That a drawbar out of alignment is a violation of the Safety Appliance Act, even though same may have been so caused by the plaintiff.

(*d*) That a drawbar out of alignment is proof positive of negligence on the part of defendant, irrespective of how such disarrangement occurred.

(*e*) That positive acts of deliberate negligence by plaintiff himself, which were the proximate cause of his injuries, are not matters of defense on the part of the defendant.

(*f*) That it is not required under the Safety Appliance Law to show any defect or want of repair in the automatic coupler in order to prove a violation of the law on the part of the defendant.

(*g*) That it is not necessary for plaintiff to allege the fact that plaintiff and defendant were both engaged in interstate commerce at the time of the injury, in order to be afforded the benefit of the Federal Employers' Liability Act.

By what process of reasoning or method of deduction did the trial court in this case arrive at the "undisputed" facts involved, in order to strike out the special answer of defendant and
213 declare it guilty of negligence as a matter of law? The bare allegation has been made that the couplers attached to said engine and car would not couple automatically by impact, as required by law; that defendant was negligent in permitting the couplers to be so they would not couple; that for the purpose of making said coupling it became necessary for plaintiff to stand upon the footboard of the engine and shove the coupler so as to bring it into proper position to make the coupling; that he placed his left foot against the coupler for the purpose of shoving it into position; every allegation being a question of fact to be submitted to the jury, subject to the denial attack and defenses of the defendant. The trial court and Court of Civil Appeals hold that adjustment of the couplers is not permitted under the Safety Appliance Act to enable the couplers to couple automatically by impact; they must automatically couple without any manipulation and defendant is denied the privilege of showing how this adjustment is made and should be made by manipulating a hand lever at the side of the car. And yet plaintiff's whole case rests upon the alleged necessity of adjustment and that it was absolutely necessary that it be done by kicking the coupler with his foot. If no adjustment is permissible under the law, how can plaintiff recover for his acts in contravention of the law? If defendant could not show the necessity of adjustment, and that by a safe means, why should plaintiff be allowed to show the necessity of adjustment and that by reckless and dangerous means? It is respectfully submitted that no legal or equitable rights can be violated by enlisting in such deliberations the aid and assistance of the faculty of reason, which should in some degree, control the conclusions to be reached; and even in the construction or interpretation of a statute, this element of
214 enlightenment should not be regarded with unqualified disfavor. Every allegation in plaintiff's petition was an allegation of fact. Even after putting plaintiff on the stand and swearing him as to the truth of the allegations, the Court was in no better position, having heard only one side of the controversy, the defendant being waived aside and not allowed to testify as to the very facts upon which plaintiff rested his claims for damages.

The whole issue and the only question in this case are based on the equipment and condition of the couplers at the time of the injuries, whether or not such equipment and its condition necessitated a man going between the engine and car to effect a coupling. If not necessary, the law was not violated. If necessary, the law was violated, provided such necessity was not created by plaintiff's own negligent act, plaintiff in error contesting the soundness of any decision, which holds it liable for the deliberate negligence of plaintiff where the coupling appliances of its engine and cars complied with the Safety Appliance Statute.

Plaintiff testified in the trial court that he came out of the house track on the hind end footboard of the engine to couple onto two

cars on the main tract; that he coupled up against them and it wouldn't make; then he slacked the engine ahead and closed the knuckle and dropped the pin on the box car; then got back on the footboard of the engine and looked down and saw the drawhead was shifted over to his side; that he reached up with his foot to shove the drawhead over so it would couple, caught his foot between the coupling and was injured. (S. F. p. 2.)

The drawbar was out of line and wouldn't couple, and the reason in my opinion why it would not couple was it was swung out over this way. I couldn't find out whether there was anything else the matter with it—I couldn't find nothing.

215 Plaintiff's own testimony showed he made no effort to use the hand lever on the car at any time.

Plaintiff further testified:

"When the cars came together and I failed to make that coupling I didn't notice anything wrong with the coupler on the engine at all." (S. F. p. 8.) "The drawhead on the engine was in line with the drawhead on the box car, that was bound to have been the case, because, if it had not been the case the cars wouldn't have come together like they did." (S. F. p. 12.) "When the brakeman couples a car he pulls a lever on the outside of the car that opens the knuckle—that raises the pin and opens the coupler up, then all he has to do is to give the signal and they back right up." (S. F. p. 12.)

Plaintiff not having used the lever that raised the pin, and opened the coupler up, previous to the first impact, the conclusion is inevitable that at such time, the pin was down and the coupler closed and therefore could not have coupled automatically without previous adjustment by means of the hand lever. There is no question that this omission on the part of plaintiff was the proximate cause of his injuries; for as said by Judge Shelby in Railway vs. Hines, 211 Fed. 270:

"The original wrong must be considered as reaching to the effect, and proximate to it."

"The question is not what cause was nearest in time or place to the catastrophe * * * The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. Insurance Co. v. Boon, 95 U. S. 117, 130."

Defendant was prepared to show by expert testimony that the proper way to couple a car was to raise the hand lever at

216 the side of the car prior to the impact; that this raised the pin and kicked open the knuckle of the coupling; that unless this was done the knuckle would be closed at the impact and the coupling could not make. This would have shown conclusively that the knuckle was closed at the time of that impact, which caused the drawbar to be bumped out of alignment by the impact, and hence plaintiff's effort to kick it into line, whereby he was injured. His testimony that he got down and closed the knuckle and dropped the pin was doubtless to show that the coupling was out of order and wouldn't couple at the impact. For what other purpose could it have been done? He knew it could not be coupled

with the knuckle closed; yet he testified to the fact two or three different times. (S. F. pp. 2, 6, 8.) These are the undisputed facts upon which defendant was held to have violated the Safety Appliance Act, and was guilty of negligence per se.

We have found only one case where the lateral play of the drawbar is directly discussed, and that is the Texarkana case—Morris vs. Railway, 158 S. W. 1055. In that case the plaintiff a switchman (as in this) was injured while endeavoring to couple a switch engine with a flat car, both equipped with automatic couplers. After the coupling was not made the first time they came together, plaintiff pulled the drawbar toward him as far as he could, gave the engineer the signal to advance, and just before the couplings came together plaintiff saw that the drawbar on the car was not in proper position and kicked the bar over as far as he could. The knuckle on the engine caught the sole of his shoe and dragged his foot into the coupling. It was held in that case that the fact that the coupler on the car was not properly adjusted in that it had too much play, did not constitute a violation of the Safety Appliance Act, requiring railroads to equip cars and engines with automatic couplers "which will couple" by impact without requiring any person to go
217 between the cars. That is practically a parallel case to the one at bar, and plaintiff in error is far from being satisfied with the explanation tendered of that case in overruling it, by the Court of Civil Appeals in this case. We ask this Court to carefully consider the facts in the two cases.

Argument under Fifth Assignment of Error.

The principle involved in this case on the question of contributory negligence as a defense under the Employers' Liability Act when considered in connection with the alleged violation of the Safety Appliance Act is pretty thoroughly examined in the late case of Atchison, etc. Ry. vs. Hines, 211 Fed. 264, decided December 8, 1913, rehearing denied March 31, 1914. This is a Texas case tried before Judge Maxey at El Paso. Plaintiff was a fireman on defendant's railroad and was injured by the explosion of the water gauge on his engine which he was attempting to fix to prevent a leakage. It will be noticed that there was an admitted defect in the water gauge at the time of the accident, there being no allegation or admission of any defect in the case at bar. The fireman on the engine in the Hines case alleged and testified that the screen around the glass was improperly fastened with a nail and fell off when he removed the nail just prior to the explosion. The testimony showed without contradiction that, had the screen been in place, plaintiff would not have been injured; that the glasses break from unaccountable causes; that when a glass becomes leaky, the proper way to repair it is to first turn off the steam and water cocks, and drain the glass before removing the screen, and that plaintiff knew such facts. It was held that the refusal of a properly requested instruction, submitting the issue of plaintiff's negligence and
218 instructing the jury that if they found such negligence he could not recover, was error. The defendant had answered

by general denial, and pleaded specially that if plaintiff was injured at the time and place alleged, the same was brought about by his own contributory negligence, and that he was furnished with a water glass properly protected by a wire screen or shield; that he was guilty of contributory negligence in that the proper way to fix the water glass, if it was leaking, was to first cut off the steam and water in the pipes or valves leading to the water glass and drain so there would be no pressure and no chance for it to explode; that he failed to take this precaution and negligently removed the screen or shield before turning off the water and steam. The case was reversed by the Circuit Court of Appeals on the refusal of a charge requested by defendant which reads as follows:

"You are instructed that if you believe from the evidence that the water shield incasing the water gauge was fastened with a nail, and you believe that the nail safely fastened it so long as it was left alone, then, if you believe from the evidence that the plaintiff was negligent in pulling out the nail without first turning off the steam valve and the water valve and opening the drain cock, you are instructed to find for the defendant."

Judge Pardee (C. J.) and Call (D. J.) held that the charge should have been given, Shelby (C. J.) dissenting. In the main opinion it is said:

"It seems to us that this charge ought to have been given by the trial court. The issue was made that the nail did not properly fasten the shield. That was one of the issues made in the case by
219 the pleadings, and it should have been submitted to the jury in such a way that the jury might determine that issue in arriving at what was the proximate cause of the injury.

"It is true that the Court gave Special Instruction No. 3, safely fastened the shield. This instruction No. 2 goes further and submits to the jury that issue as well as the other issues asked by the defendant, but that instruction went only to the extent of submitting to them the question as to whether the nail contained therein, which directly challenged the question of whether the plaintiff was guilty of negligence in so pulling out the nail and dropping the screen and leaving the glass unprotected at the time he was hurt, and before taking the proper precaution to make the water glass harmless. * * * The mere fact of a leaky water glass, under all the testimony, if properly screened, cannot, we think, be construed into a defective boiler or appliance."

Judge Shelby in the Hines case took the position (as the Court of Civil Appeals in the case at bar takes) that the Federal Employers' Liability Act in cases where the violation by the carrier of any statute for the safety of the employes contributed to the injury, absolutely abolished the defense of contributory negligence. There is no doubt that the question of contributory negligence was submitted to the jury in charge No. 2 and this is conceded by Judge Shelby in his dissenting opinion where he says:

"The charge, in substance, is that, if the plaintiff was guilty of contributory negligence, by the act described in the charge 'you are instructed to find for the defendant.' The effect of the charge was

to instruct a verdict for the defendant if the plaintiff was guilty of contributory negligence. That the charge is so understood by this Court, is shown by its opinion that the charge 'directly chal-
220 lenged the question of whether the plaintiff was guilty of negligence!"

The points of similarity between the Hines case and the case at bar are these:

In the Hines case the fireman failed to cut off the steam and water in the pipes or valves leading to the water glass so there would be no pressure of steam, before removing the screen to fix the leak. In the case at bar the switchman failed to stop the engine and adjust the drawbar before the impact, taking chances on kicking it into position with his foot while the engine was moving. In the Hines case the removal of the screen before turning off the steam was negligence and the proximate cause of the injury, as it should have been held by the trial court and Court of Civil Appeals in the instant case, that failure to use the lever at the side of the car and failure to stop the engine and adjust the drawbar rather than kicking same with his foot while the engine was in motion, was negligence and the proximate cause of plaintiff's injuries.

Argument under Seventh and Eighth Assignments of Error.

Plaintiff in error contests the interpretation which the Court of Civil Appeals places upon the statute in question, as also the quotation made to sustain it; but for reasons of "greater delicacy and nearer consequence," deems it improper to comment thereon.

Argument under Ninth Assignment of Error.

Plaintiff in error regards this assignment as evidencing one of the most indefensible errors committed in the case—the allegation that "defendant used on said railroad in interstate and in-
221 trastate commerce a certain engine and a certain car; and it became and was the duty of plaintiff then and there to couple the aforesaid engine and car together" being, on its face demurrable as not stating facts sufficient to constitute a cause of action under the Safety Appliance Act and decisions, and defendant's general demurrer should have been sustained. One need only refer to the authorities cited under this assignment to be convinced of the correctness of this conclusion.

Concluding Remarks.

There are many points in this case not discussed in this application. By reason of the great delay in the Official reporter transcribing his notes, and the necessary haste incident thereto in preparing the record, some material matters were left out of the record, not only bearing on the law but the facts as well. From the present

condition of the record, no court can conscientiously or intelligently pass upon the questions raised in this case. The issue- this Court is asked to consider are far-reaching and important, and should be considered with deliberation by this Court with all the lights before it which may be furnished by the evidence and all the evidence, that of the defendant on the trial as well as the plaintiff. This is not a case where the court should declare defendant guilty of negligence as a matter of law, because the facts as alleged by plaintiff were vigorously disputed, but the defendant was placed in legal in communicado by the Court—the judicial silencio being entered under vain and repeated protests and exceptions. The trial court and Court of Civil Appeals have taken a position in this case that can neither be justified nor sustained by any statutory construction, or deduction of either a Federal or State Court any where, nor by the logic or deduction of reason which should dominate the
222 consideration of every case. Plaintiff in error asks that the question raised be given only legitimate consideration, and because of the importance of the questions involved, it may require the examination of the record and briefs with some care.

Petitioner represents that John Sehorn, Esq., who resides in San Antonio, Bexar County, Texas, is the attorney of record for defendant in error, William Wagner.

Wherefore, petitioner prays for writ of error to the Court of Civil Appeals for the Fourth Judicial District of Texas, at San Antonio, and for citation as provided by law, and that upon a hearing the judgment rendered herein be reversed and the cause be remanded for a new trial.

Respectfully submitted,

HOUSTON, BOYLE & STOREY,

Attorneys for Plaintiff in Error,

S. A. & A. P. Ry. Co.

Endorsed: App. No. 8867. In the Supreme Court of Texas. San Antonio & Aransas Pass Railway Co., Plaintiff in Error, vs. William Wagner, Defendant in Error. Application of San Antonio & Aransas Pass Railway Company for Writ of Error. Houston, Boyle & Storey, Attorneys for Plaintiff in error, S. A. & A. P. Ry. Co. Filed in the Court of Civil Appeals, at San Antonio, Texas, May 22, 1914. Jos. Murray, Clerk. Filed in Supreme Court May 23, 1914. F. T. Connerly, Clerk, by H. L. Clamp, Deputy. Refused.

223 *Clerk's Office.*

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the foregoing thirty-eight pages is a true and correct copy of the original Application for Writ of Error now on file in this office in the case of San Antonio & Aransas Pass Railway Company, Plaintiff in Error, vs. William Wagner, Defendant in Error, App. No. 8867, from the District Court of Bexar County.

I further certify that above application was by this Court refused on the 11th day of November, A. D., 1914.

Witness my hand and the seal of said office, this the 3rd day of December, A. D., 1914.

[SEAL.]

E. T. CONNERLY, *Clerk.*

Endorsements on Certified Copy of Application for Writ of Error: Appl. No. 8867. S. A. & A. P. Ry Co. vs. William Wagner. Certified Copy of Petition for Writ of Error.

224 *Judgment of Supreme Court of Texas.*

In Supreme Court of Texas.

November 11th, 1914.

S. A. & A. P. Ry. Co.
vs.
William Wagner.

From Bexar County. Fourth District.

This day has come on to be heard the application of S. A. & A. P. Ry. Co. for a writ of error to the Court of Civil Appeals for the Fourth District, and the same having been duly considered, it is ordered that said application be refused. That the applicant S. A. & A. P. Ry. Co. and its surety, U. S. Fidelity & Guaranty Co. pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said Court this the 28 day of Nov., A. D., 1914.

[SEAL.]

F. T. CONNERLY, *Clerk,*
By H. L. CLAMP, *Deputy.*

Endorsed: Application No. 8867. S. A. & A. P. Ry. Co., vs. William Wagner. Copy of Judgment in Supreme Court. Application for Writ of Error Refused. Filed in the Court of Civil Appeals at San Antonio, Texas, Nov. 30, 1914. Jos. Murray, Clerk.

225 In the Supreme Court of the United States.

No. —.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY et al., Plaintiffs in Error,
versus
WILLIAM WAGNER, Defendant in Error.

To the Hon. W. S. Fly, Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas:

Your petitioners, the San Antonio & Aransas Pass Railway Company and the United States Fidelity & Guaranty Company, respectfully show, that in the above entitled cause, then pending in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, on appeal from the District Court of Bexar County in and for the 57th Judicial District of Texas, wherein petitioner, the San Antonio & Aransas Pass Railway Company, was the only party appellant, and petitioner, the United States Fidelity & Guaranty Company, a corporation, was surety on the appeal bond of the San Antonio & Aransas Pass Railway Company, and William Wagner was the only appellee, the said Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, on the 4th day of March, 1914, affirmed the judgment and decree in said cause theretofore rendered on the second day of May, 1913, by the District Court of Bexar County in and for the 57th Judicial District of Texas, in favor of William Wagner, after requiring remittitur reducing said judgment from Fifteen Thousand Dollars ($15,000.00) to Ten Thousand Dollars ($10,000.00); and the said Court of Civil Appeals, in affirming said judgment, on the 15th day of April, 1914, entered its order and decree for the sum of Ten Thousand Dollars ($10,000.00), with interest thereon from the date of such judgment in the said District Court at the rate of six per cent per annum, and costs of suit, in favor of the said
226 William Wagner and against appellant, the San Antonio & Aransas Pass Railway Company, and its surety, the United States Fidelity & Guaranty Company.

That in due time, on the 19th day of March, 1914, petitioner, the San Antonio & Aransas Pass Railway Company, filed in said Court of Civil Appeals its motion for rehearing, which motion, thereafter, on the 22nd day of April, 1914, was overruled and denied by said Court of Civil Appeals.

That, thereafter and in due time, to wit, on the 22nd day of May, 1914, petitioner, the San Antonio & Aransas Pass Railway Company, applied, in due form and as authorized by law, to the Supreme Court of the State of Texas for writ of error in said cause to the said Court of Civil Appeals, which application, on the 11th day of November, 1914, was denied by the said Supreme Court of Texas, and the writ of error prayed for was refused, when and whereupon said

judgment and decision theretofore rendered in the Court of Civil Appeals, which is the highest court of law or equity in said State of Texas in which a decision in said suit could be had, became and is final.

Petitioners would show unto this Honorable Court that in the record and proceedings and rendition of the decree in the above cause by the said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas manifest error has occurred, greatly to their damage, whereby petitioners feel aggrieved:

That in the record and proceedings, it will appear that there was drawn in question the construction of two several statutes and enactments of the Congress of the United States, the one being known and commonly designated as "The Safety Appliance Act", being an act to promote the safety of employees and travelers upon railroads, et cetera, approved March 2, 1893, and amendment thereto approved March 2, 1903, and the Act of Congress of the United States commonly known and designated as "The Employers' Liability Act", the same being an act relating to the liability
227 of common carriers by railroad to their employees in certain cases, approved April 22, 1908.

That in said action before said state courts, petitioner, the San Antonio & Aransas Pass Railway Company, in the trial court and in said appellate courts, set up and claimed certain rights, privileges, immunities and defences under said Acts of Congress of the United States, and the courts of Texas, by the decision and judgment herein complained of, decided against such rights, privileges and immunities so specially set up and claimed by petitioner, all of which is fully apparent in the record and proceedings of the case, and specifically set forth in the assignments of error filed herewith.

Wherefore, your petitioners pray the allowance of a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of supersedeas bond.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY,
UNITED STATES FIDELITY & GUARANTY COMPANY,
Petitioners,

By HOUSTON, BOYLE & STOREY,
Attorneys for Petitioners.

A. W. HOUSTON,
Of Counsel.

Let the writ of error issue as prayed for, upon the execution of bond in the sum of Thirty Thousand Dollars ($30,000.00), such bond when approved to act as a supersedeas.

Dated December 5, 1914.

W. S. FLY,
Chief Justice Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

228 [Endorsed:] In the Supreme Court of the United States. No. —. San Antonio & Aransas Pass Ry. Co. et al., Plaintiffs in Error, versus William Wagner, Defendant in Error. Petition for Writ of Error. Filed in the Court of Civil Appeals, at San Antonio, Texas, Dec. 5, 1914. Jos. Murray, Clerk. Houston, Boyle & Storey, San Antonio, Texas.

229 In the Supreme Court of the United States.

No. —.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY et al., Plaintiffs in Error,
versus
WILLIAM WAGNER, Defendant in Error.

Know all men by these presents, that we, San Antonio & Aransas Pass Railway Company and the United States Fidelity & Guaranty Company, as principals, and Leon N. Walthall and Edward Roos, as sureties, are held and firmly bound unto the above named William Wagner in the sum of Thirty Thousand Dollars ($30,000.00), to be paid to him, and for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated, this 5th. day of December, A. D., 1914.

Whereas, the above named plaintiffs in error have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas:

Now, therefore, the condition of this obligation is such, that if the above named plaintiffs in error shall prosecute their said writ of error to effect, and answer all costs and damages that may be adjudged if they shall fail to make good their plea, then, this
230 obligation shall be void; otherwise, to remain in full force and effect.

Witness our signatures, this 5th day of December, A. D. 1914.

SAN ANTONIO & ARANSAS PASS
RAILWAY COMPANY,
By HOUSTON, BOYLE & STOREY,
Attorneys of Record.
UNITED STATES FIDELITY &
GUARANTY COMPANY,
By WM. L. STILES,
Agent & Att'y in Fact.
LEON N. WALTHALL,
EDWARD ROOS,
Sureties.

THE STATE OF TEXAS:
County of Bexar:

Personally appeared before the undersigned authority Leon N. Walthall and Edward Roos, whose names are subscribed, as sureties, to the above and foregoing bond and each of them, having been duly sworn, stated upon his oath that he is worth at least the sum of Thirty Thousand Dollars ($30,000.00) over and above all of his exemptions and liabilities.

LEON N. WALTHALL.
EDWARD ROOS.

Sworn to and subscribed before me, this 5th. day of December, A. D., 1914.

LAWRENCE B. BRADY,
Notary Public, Bexar County, Texas.

231 If the foregoing bond were presented to me for approval I would approve the same.

D. H. HART,
Clerk United States District Court,
Western District of Texas.
By A. I. CAMPBELL,
Deputy.

I hereby approve the foregoing bond and the sureties thereon, this the 5th. day of December, 1914.

W. S. FLY,
Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

Endorsements on Bond: In the Supreme Court of the United States. No. —. San Antonio & Aransas Pass Railway Company et al., Plaintiffs in Error, vs. William Wagner, Defendant in Error. Bond. Filed in the Court of Civil Appeals at San Antonio, Texas, Dec. 5, 1914. Jos. Murray, Clerk. Houston, Boyle & Storey, San Antonio, Texas.

232 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the Judges of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the San Antonio & Aransas Pass Railway Company and William Wagner, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in ques-

tion the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said San Antonio & Aransas Pass Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof,
233 that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 5th day of December, in the year of our Lord one thousand nine hundred and fourteen.

[The Seal of the U. S. District Court, Western District, Texas, San Antonio.]

D. H. HART,
Clerk District Court of the United States for the Western District of Texas.
By A. I. CAMPBELL,
Deputy Clerk.

234 [Endorsed:] In the Supreme Court of the United States. No. —. San Antonio & Aransas Pass Ry. Co., et al., Plaintiffs in Error, vs. William Wagner, Defendant in Error. Writ of Error. Filed in the Court of Civil Appeals, at San Antonio, Texas, Dec. 5, 1914. Jos. Murray, Clerk.

235 *Certificate of Lodgment.*

THE STATE OF TEXAS:

I, Jos. Murray, Clerk of the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, do hereby certify that there was lodged with me, as such Clerk, on December 5th, A. D., 1914, in the matter of The San Antonio & Aransas Pass Railway Company et al. vs. William Wagner,

1st. The original bond of which a copy is herein set forth;

2nd. Two copies of the Writ of Error as herein set forth, one for the defendant, and one to file in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at my office in San Antonio, Texas, this December 8th, A. D., 1914.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
Clerk Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas.

236 UNITED STATES OF AMERICA, *ss:*

The President of the United States to William Wagner, Texas, Greeting:

You are hereby cited and admonished to be [illegible] appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Court of Appeals for the Fourth Supreme Judicial District of Texas, wherein the San Antonio & Aransas Pass Railway Company and the United States Fidelity & Guaranty Company are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, this 5th day of December, 1914.

W. S. FLY,
Chief Justice Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

Attest:

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
Clerk Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

SAN ANTONIO, TEXAS, December 7, 1914.

I, Attorney of Record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

JOHN SEHORN,
Attorney for William Wagner, Defendant in Error.

237 In the Supreme Court of the United States.

No. —.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY et al., Plaintiffs in Error,
versus
WILLIAM WAGNER, Defendant in Error.

Now comes Plaintiffs in Error in the above styled cause, and say that in the record and proceedings, decision and final judgment in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas there is manifest error, in this:

First. Said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, in sustaining the ruling of said District Court, erroneously held that the lateral play to the drawbar of the engine to which the automatic coupler is attached, which lateral play is made necessary for the purpose of rounding curves, and which required adjustment at times, is a defect and violation of the Federal Safety Appliance Act, and, therefore, negligence per se, and that no adjustment is permitted under said Act; said holding being an erroneous construction of said Act, thereby making a compliance with the provisions of the same by said plaintiff in error, San Antonio & Aransas Pass Railway Company, impossible of performance, and the ruling of the said District Court, sustained by said Court of Civil Appeals, denied to said plaintiff in error its legal right to the defenses pleaded and the necessary proof to support the same, and thereby denied to said plaintiff in error its legal right to show by competent evidence that said automatic couplers were properly equipped with safety appliances for manipulating said couplers from the outside of the said car, and said engine, which avoided the necessity of said defendant in error going between said engine and said car for the purpose of adjusting the knuckle thereof, and for kicking said drawbar with his foot for the purpose of alignment, which said plaintiff in error pleaded and was ready to prove, was contributory negligence on his part, and, in the absence of any violation on its part of any Federal Statute enacted for the safety of employees, it was entitled to plead such contributory negligence and submit its evidence to sustain the same to the jury, in diminution of damages, in proportion to the amount of negligence attributable to said defendant in error; which erroneous holding by said Court of Civil Appeals was manifest error, entitling plaintiffs in error to a reversal of said cause.

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Second. Said Court of Civil Appeals erroneously held in construing the Federal Safety Appliance Act that, as a matter of law, said statute was violated by plaintiff in error, San Antonio & Aransas Pass Railway Company, by reason of the position of the drawbar on the engine, holding that such position of the drawbar disclosed a defect in the coupler and that said defective coupler on said engine contributed to the injury, for the reason that the record shows

the defendant in error's negligence alone was the cause of the drawbar being out of alignment, he having failed to use the safety device or lever at the side of the car for the purpose of adjusting the knuckle of the coupler on the car to which the engine was sought to be coupled, prior to the first impact which caused the misalignment, which act of negligence on the part of defendant in error was the cause of the failure to couple, the kicking of the drawbar for the purpose of alignment being the direct cause of his injuries; the erroneous holding of said Court of Civil Appeals declaring the deflected position of the drawbar disclosed a defect in the automatic
239 coupler denied the plaintiff in error its legal rights and defenses under said Act and the general rules of pleading and evidence, for which it is entitled to a reversal of said cause.

Third. Said Court of Civil Appeals erroneously held, in construing said Federal Safety Appliance Act, that the same was violated, if in preparing a coupler for use it was reasonably necessary for a man to place a part of his body, arm or leg in a hazardous position; while said Act as construed by the Federal courts declare- the same to be violated when the coupling apparatus was so constructed that in preparing a coupler for use, it was reasonably necessary for a man to place some part of his body in a hazardous position, the defect in the construction thereby creating the necessity for preparation for use by assuming a hazardous position. There being no evidence in the record other than the unsupported testimony of defendant in error that there was any necessity for him to go between the cars or kick the coupler with his foot, and there being no evidence in the record of any defect in construction of said coupling appliance or of said automatic coupler, the court in effect held that the fact that he did go between the cars and kick the knuckle of the coupler with his foot conclusively showed that said Act was violated and that said plaintiff in error was therefore liable for any damages sustained by him; said holding and decision by said Court of Civil Appeals being manifestly erroneous, entitling plaintiffs in error to a reversal of said cause.

Fourth. Said Court of Civil Appeals has erroneously construed said Federal Safety Appliance Act in holding that said statute requires that the automatic coupler in use by said plaintiff in error, must be operative for each car as to the device of that particular car, so that defendant in error or other employee would not have
240 to go to another car to make the coupling of the car in question; for the reason that said Safety Appliance Act requires only that each car must itself be completely equipped with couplers coupling automatically by impact, no requirement being specified as to operative devices of each particular car or otherwise, and such erroneous construction by said Court of Appeals imposes an additional burden upon said plaintiff in error not required by the statute, in that under said construction of said Act said plaintiff in error is required to provide separate coupling devices operative for each car as to the device of that particular car; whereas, the coupling devices and appliances now in use by said plaintiff in error, as would have been shown, if allowed, require the manipulation of a coupling de-

vice on only one particular car in order to completely control and effect a coupling automatically by impact with any connecting car, which said plaintiff in error was ready to prove, had it been permitted to introduce evidence as to the necessary adjustment of said automatic couplers, which was denied by the ruling of said District Court and sustained in its ruling by said Court of Civil Appeals; the holdings of said courts being manifestly erroneous, entitling said plaintiff in error to a reversal of said cause.

Fifth. Said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas erred in sustaining the ruling of the District Court in striking out plaintiff in error's plea of contributory negligence on the part of defendant in error, and in holding that the Federal Employers' Liability Act wholly abolished the defense of contributory negligence, and in refusing to allow plaintiff in error to plead said defense and submit evidence to the jury to sustain said plea even in diminution of damages, said plaintiff in error having specially denied and offered to prove that it in no wise had violated said Act or any statute enacted for the safety of em-

241 ployees, nor had such violation contributed in any wise to the injury of said defendant in error, nor had such injuries resulted in whole or in part from the negligence of any of the officers, agents, or employees of said plaintiff in error, nor by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment, said court holding that plaintiff in error, San Antonio & Aransas Pass Railway Company was guilty of negligence as a matter of law, on the unsworn allegations of defendant in error in his petition, and refusing to allow said plaintiff in error to specially deny or disprove said unsupported allegations by either pleading or proof; which ruling of said trial court and sustained by said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, was manifest error on the part of said courts for which plaintiffs in error are entitled to a reversal of said cause.

Sixth. Said Court of Civil Appeals erred in overruling plaintiff in error, San Antonio & Aransas Pass Railway Company's first assignment of error and in sustaining the ruling of the District Court striking out of its answer all the defenses therein set up except the general denial, for the reason that in order for a defendant to avail himself of a Federal statute or a plea of contributory negligence, the same must be specially pleaded, and the trial court, in striking out all of said plaintiff in error's pleas, arbitrarily denied to it the legal defenses afforded under said Federal Safety Appliance Act and said Federal Employers' Liability Act therein specially pleaded, and further denied to said plaintiff in error the defense of contributory negligence to defendant in error's claim for damages which, under said statutes was available, in the absence of negligence on its part as provided in said Liability Act, if sustained by proof, in order to diminish the amount of damages claimed, the same being a question of fact to be determined by the

242 jury; and the denial to said plaintiff in error of said defenses as aforesaid, was fundamental error, requiring the reversal of said cause.

Seventh. Said Court of Civil Appeals committed manifest error in holding that the lateral play of the drawbar of the engine is a defect and a violation of the Federal Safety Appliance Act and that no adjustment of the same is permitted under said Act, as set out in plaintiff in error's sixth assignment of error in its application to the Supreme Court of Texas for a writ of error, for the reason that if such construction of said Act be correct, the effect thereof makes a compliance with the provision of said Statute a practical impossibility by plaintiff in error, would require the abandonment of its business as a common carrier and result in an arbitrary confiscation of its property without due process of law; for which manifest error in the construction of said Act plaintiff in error is entitled to a reversal of said cause.

Wherefore, because of the errors assigned, plaintiffs in error pray that the judgment and decision of the said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas be set aside and reversed and to that end, writ of error herein be granted as prayed.

A. W. HOUSTON,
A. B. STOREY,
R. J. BOYLE,
Counsel for Plaintiffs in Error.

A. W. HOUSTON,
Of Counsel.

Endorsed: In the Supreme Court of the United States. No. —. San Antonio & Aransas Pass Railway Company, et al., Plaintiffs in Error, versus William Wagner, Defendant in Error. Assignments of Error. Filed in the Court of Civil Appeals at San Antonio, Texas, Dec. 5, 1914. Jos. Murray, Clerk. Houston, Boyle & Storey, San Antonio, Texas.

243 *Return to Writ.*

UNITED STATES OF AMERICA:

Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entited cause, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Court of Civil Appeals, in the City of San Antonio, Texas, this the 8th day of December, A. D., 1914.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
Clerk Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas.

244 *Cost Bill in Court of Civil Appeals, San Antonio, Texas.*

No. 5206.

S. A. & A. P. Ry. Co., Appellant,
vs.
Wm. Wagner, Appellee.

From Bexar County.

Disposed of April 22, 1914.

Opinion by Fly, C. J.

Record Filed September 9, 1913.

How Decided: Affirmed with Remittitur.

Filing Record	$ .50
Docketing Cause	.50
Appearances	1.00
Filing Briefs and other Papers	3.60
Notices	4.50
Orders	3.00
Judgment	1.00
Recording Opinion	8.85
Certificates with Seal	1.00
Taxing Cost	1.00
Certified Copies Bill of Costs	2.00
Mandate	1.50
Filing and Docketing Motions	.70
Precepts	2.00
Making Certified Copy of Motions	9.75
Sheriff's Fees	1.70
Transcript	47.50
Issuing Citation	1.00
Certificate of Lodgment	.50
Certificate of authentication	.50
Transcript to Supreme Court of the United States	124.00
Transcript to Supreme Court of Texas	2.00
Express Charges to and from Supreme Court	.60
Costs in Supreme Court of Texas	7.00
Total	$225.70

245 Brought Forward:

Total	$225.70
By costs due by Appellee	71.90
To Balance due by Appellant	$153.80

THE STATE OF TEXAS:

I, Jos. Murray, Clerk of the Court of Civil Appeals of Texas, at San Antonio, hereby certify that the above and foregoing Bill of Costs for the sum of One Hundred Fifty-three & 80/100 Dollars, is true and correct.

Given under my hand and seal of office, this 11th day of December, A. D., 1914.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY, *Clerk.*

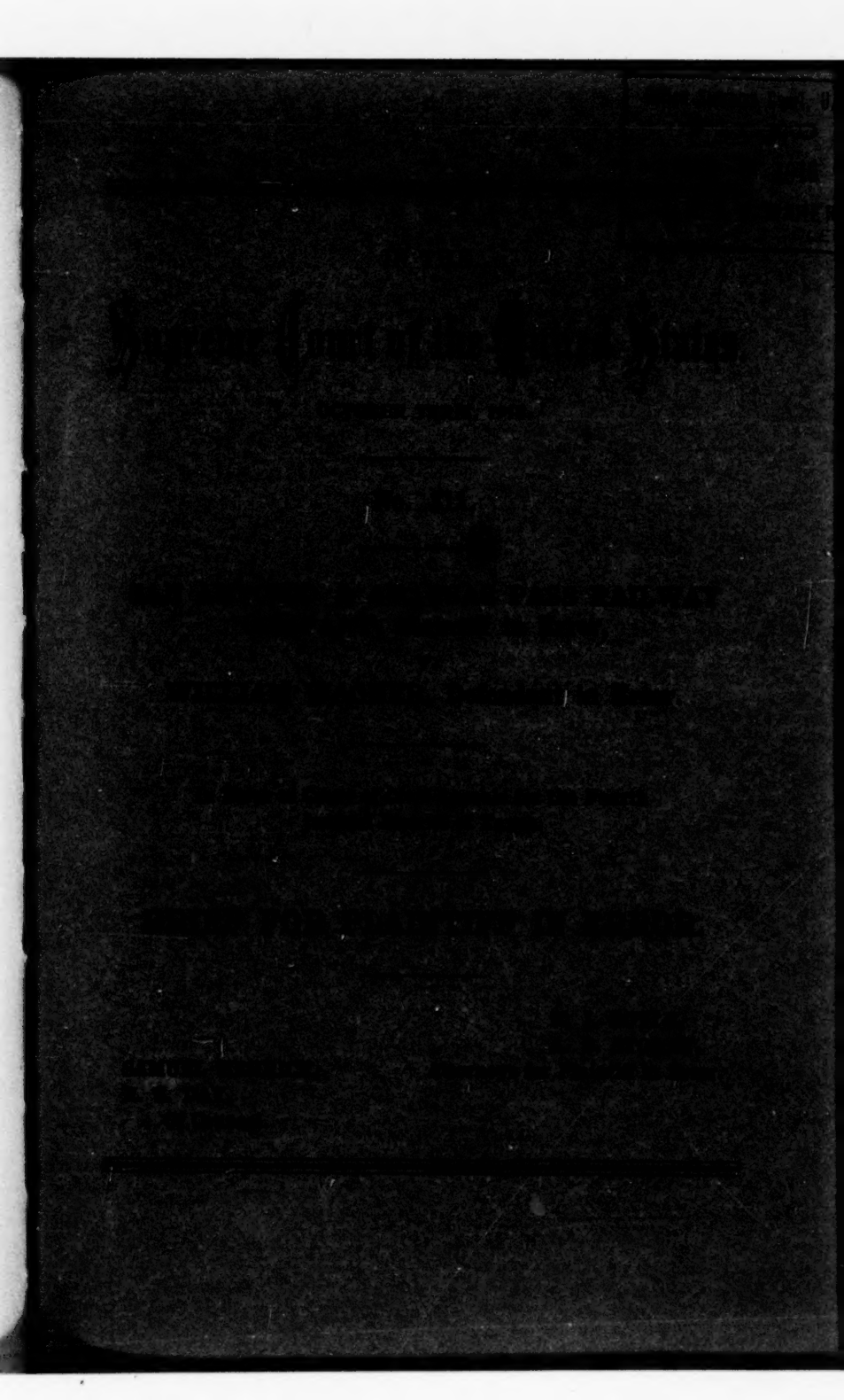
246 I, Jos. Murray, Clerk of the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, do hereby certify that the foregoing is a true, full and complete transcript of the record, and all the proceedings in the case of San Antonio & Aransas Pass Railway Company, Appellant, vs. William Wagner, Appellee, and also of the opinion of the Court rendered therein, as the same now appears on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my office in San Antonio, Texas, this December 11th, A. D., 1914.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
Clerk Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

Endorsed on cover: File No. 24,486. Texas Court of Civil Appeals, 4th Supreme Judicial District. Term No. 742. San Antonio & Aransas Pass Railway Company, plaintiff in error, vs. William Wagner. Filed December 26th, 1914. File No. 24,486.



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IN THE

Supreme Court of the United States.

October Term, 1915.

No. 311.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY,
Plaintiff in Error,
v.
WILLIAM WAGNER, *Defendant in Error.*

In Error to Court of Civil Appeals for the Fourth Judicial District of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

I. STATEMENT OF THE CASE.

This suit was instituted by defendant in error, Wm. Wagner, against the San Antonio & Aransas Pass Railway Company, plaintiff in error, in the district court of Bexar County, Texas, by which damages were sought in the sum of forty thousand dollars for injuries alleged to have been received by reason of plaintiff in error's negligence. By amended petition filed in said court on April 8, 1913, defendant in error made, in substance, the following allegations: (*a*) That on October 18, 1911,

plaintiff was in the employ of the defendant as a brakeman; that on said date defendant was engaged in both interstate and intrastate commerce, and that at Kennedy, on the line of defendant railroad, defendant then and there used on said railroad in interstate commerce and in intrastate commerce a certain engine and certain car, and it became the duty of plaintiff then and there to couple the aforesaid engine and car together; that the couplers attached to said engine and car would not couple automatically by impact as required by law, and for the purpose of making said coupling it became necessary for plaintiff to stand upon the footboard of said engine, between said engine and car, and to shove the knuckle of the coupler on said engine so as to bring it into proper position to make the coupling as aforesaid; that he placed his left foot against the knuckle of the coupler of the engine for the purpose of shoving said knuckle into position so as to make the coupling as aforesaid, when in some manner he lost his balance and slipped and fell, and his left foot was caught between said couplers and was crushed and mangled, and he was thereby otherwise seriously, painfully, and permanently injured (Rec. pp. 1–2); (*b*) That defendant was negligent in having and permitting the couplers on said engine and car to be so that they would not couple automatically by impact, as required by law, and this negligence was the direct cause of plaintiff's injuries (Rec. p. 2); (*c*) That by reason of his slipping his left foot was caught between the couplers of engine and car and smashed, etc., and injured otherwise as specifically set out, which injuries were permanent and incurable (Rec. p. 2).

Plaintiff in error demurred generally and specially excepted to said amended petition, because (1) it did not appear therefrom whether defendant railway company was engaged in interstate or intrastate commerce at the

time of plaintiff's alleged injuries, nor whether he was employed in interstate or intrastate commerce at said time, nor whether a breach of the State or Federal law was charged; (2) that it did not appear from said petition that defendant's said engine and cars were not *equipped* with couplers coupling automatically by impact; (3) that same was insufficient because it did not set out or allege any defect in the couplers, nor defect in the maintenance of the couplers in violation of the law, State or Federal (Rec. p. 3).

The view of the case, as taken by the trial court and the Court of Civil Appeals, ignored the foregoing special exceptions by striking out the special defenses set up by plaintiff in error, holding as a matter of law that because the couplers did not couple automatically by impact, regardless of the reason therefor, negligence was shown on the part of said defendant (Rec. pp. 6, 7).

Defendant railway company set up and pleaded in its special answer in the trial court, in substance, the following:

1. That at the time of the accident it was engaged in interstate commerce and pleaded the Safety Appliance Act of March 2, 1893, as amended by act of March 2, 1903.

2. That at the time of said accident defendant's engine and cars were equipped with automatic couplers, coupling automatically by impact, and which could be uncoupled without the necessity of men going between the ends of cars when the cars were in motion; that all couplers attached to railroad engines or cars must be provided with sufficient lateral motion to enable cars coupled together to round curves, and with adjustable knuckles and such couplers must be adjusted at times so that they would couple automatically by impact, and there was no kind of automatic coupler which would

couple automatically at all times without previous adjustment by reason of the lateral play necessary, and that said couplers should have been adjusted by plaintiff only after bringing said engine and cars to a standstill and going between the ends of the cars, and there was no necessity for plaintiff to go between moving engine and cars or kicking said coupler over with his foot, or endangering his personal safety in any way, and further, that the Acts of Congress do not require that said automatic couplers shall be of such construction that they will couple automatically by impact at all times, without any adjustment of the couplers.

3. That the adjustment of said couplers in order to couple automatically by impact, could have been done by plaintiff with perfect safety by going between the engine and car while standing, but that plaintiff negligently, recklessly and carelessly sought to adjust the couplers while the engine was moving close to the car by kicking the coupler with his foot, etc., and his injuries resulted from such negligence and recklessness and not from any negligence on part of defendant or any violation of law on its part.

4. That there was no defect in the coupling apparatus on its engine or cars at time of plaintiff's injuries; that same were equipped as required by the Acts of Congress, and that plaintiff's injuries resulted from his own negligence and contributory negligence (Rec. pp. 4, 5).

Plaintiff excepted to all that part of defendant's amended answer following the general denial as being insufficient in law to constitute any defense, and same were sustained by the court and stricken out (Rec. pp. 6, 7).

The view of the trial court may be better understood by the following instructions to the jury during the course of the trial:

"Gentlemen of the jury, I wish you would pay particular attention to me at this time, as you will not have this, this will not be taken with you in the jury room. I want you to remember it carefully. The court having admitted before you certain testimony with reference to adjusting couplers on engines and cars on account of lateral play in order that they might couple automatically by impact, and having admitted before you a certain rule of defendant with reference to prohibiting employees from taking dangerous positions while engaged in their work; and also having admitted before you testimony tending to show that the plaintiff should not have kicked the coupler over in the manner he claims to have done at the time he was hurt, but that he should have had the engine stopped *and gotten down and adjusted the coupler, if necessary, to make said coupler couple automatically by impact;* and the court *being now of the opinion that such testimony is not admissible to prove any issue of this cause,* I do now exclude the same from your consideration and direct you in considering your verdict in this case you do not consider any such testimony." (Rec. p. 98.)

The trial court in its main charge to the jury instructed them as follows:

1.

"If you find from the evidence that at the time of the accident the defendant's locomotive and car to which it was attempted to couple the locomotive were not equipped with couplers coupling automatically by impact, without the necessity of plaintiff's going between the ends of the cars; and if you further find from the evidence that by reason of such fact (if found by you) and as the proximate result thereof the plaintiff received any of the injuries complained of by you, you will find for the plaintiff.

II.

"If you find from the evidence that said locomotive and car of defendant, at the time of the accident, were

equipped with couplers coupling automatically by impact, without the necessity of plaintiff's going between the ends of the cars, you will find for the defendant.

III.

"If you find for the plaintiff and believe from the evidence that he sustained any of the injuries alleged in his petition, then you should allow him such sum as you believe from the evidence will fully compensate him for the injuries received, if any, which are alleged in his petition and which you find from the testimony to have been sustained, if any were sustained and in estimating the damages you award the plaintiff, if any, you may take into consideration the mental and physical pain, if any, suffered by him consequent upon such injuries, if any, and the time, if any, he has lost in consequence of his injuries, if any; and if you believe from the evidence that such injuries, if any, are permanent and will impair his capacity to labor and earn money in the future, then you may award him such sum as you believe from the evidence will fairly compensate him for such impaired capacity, if any, to labor and earn money in the future." (Rec. pp. 7, 8.)

The following special charges, among others, asked by defendant, were refused by the court:

Special Charge No. 7:

"Gentlemen of the Jury: If you find from the evidence that the coupling apparatus on the engine and tender of defendant was out of adjustment at the time of the accident so that it would not couple automatically by impact by reason of any acts of the plaintiff, then, you will find in favor of the defendant." (Rec. pp. 12–13).

Special Charge No. 8:

"Gentlemen of the Jury: If you find from the evidence that the coupling apparatus on defendant's engine and tender was in such condition that it would couple automatically by impact when the first attempt to couple

defendant's engine and car was made, and you find that the drawbar of said coupling apparatus was out of adjustment when the second coupling was attempted, and that such condition resulted from the acts of the plaintiff, then you will find in favor of the defendant." (Rec. 12–13.)

The verdict of the jury and judgment of the court was in favor of the plaintiff in the sum of $15,000.00 (Rec. pp. 14, 15).

Motion for new trial was duly made on assigned errors Rec. pp. 15–22) and overruled by the court (Rec. p. 24).

Among other errors assigned were included errors committed by the court in its main charge and in the first and second paragraphs thereof, as well as the refusal to give special charges numbers 7 and 8 requested by the defendant. (Rec. pp. 18, 19, 21.)

On appeal to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, the judgment of the trial court was in all things affirmed, except as to amount of the judgment, affirmance being conditional upon plaintiff filing a remittitur of $5,000.00, reducing the judgment to $10,000.00 (Rec. pp. 87–93).

Motion for rehearing was filed in said court of appeals, based on the following assigned errors committed by that court:

1. Because the court erred in sustaining the action of the trial court in striking out, on motion of plaintiff, the special answer of defendant.

2. Because the court erred in holding that said defendant could have shown under its general denial all that it pleaded in its special answer in regard to its couplers, and in further holding that said defendant was permitted to prove all that it offered on the subject.

3. Because the court erred in holding that under the facts, the plea of contributory negligence afforded no

defense, either under the Federal or State law, that would relieve it of liability and that said defense was unavoidable by reason of defendant's own admissions in said stricken answer that it was necessary to go between the cars to adjust said couplers, for the reason that defendant in said answer nowhere admitted that it *was* necessary for plaintiff to go between the engine and car to adjust said coupler.

4. Because the court erred in sustaining the action of the trial court in striking out said special answer, and in taking the question of contributory negligence entirely from the jury, for the reason that such defense must be specially pleaded and the same is a proper and legal defense under the State and Federal Statutes to be submitted to the jury in reduction of damages.

5. Because the court erred in sustaining the action of the trial court in striking out said answer and in not permitting the introduction of any evidence based thereon, and thereafter entering a verdict and judgment against appellant because of the absence of such evidence, thereby directly creating the condition upon which verdict was rendered and judgment was based.

6. Because the court erred in sustaining the trial court in striking out said special answer setting up the defense of contributory negligence on the part of plaintiff, and in holding that under the Federal Statute contributory negligence is no defense, for the reason there is no allegation in plaintiff's petition that either plaintiff or defendant was engaged in interstate commerce at the time of the accident, this averment being made by defendant in its special exception and special answer, which were overruled and stricken out on motion of plaintiff, without which allegation of employment either in interstate or intrastate commerce at such time plaintiff had no right to avail himself of the protecting provisions of the Federal

or State Employers' Liability Act as to contributory negligence, this omission being supplied only by defendant's pleadings which were stricken out on motion of plaintiff." (Rec. pp. 94, 95.)

The foregoing motion for rehearing was duly overruled by the court (Rec. pp. 107–111) and application to the Supreme Court for writ of error was thereafter in due time made (Rec. pp. 111–134) which was by that court refused (Rec. p. 135) and the cause is now before this Honorable Court on writ of error to said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas (Rec. pp. 136–141) on the following assignments of error alleged to have been committed by the State court, namely:

II. ASSIGNMENTS OF ERROR.

Appellant assigned the following errors in the opinion and judgment in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, which sustained the ruling of the said District Court:

1. In holding that the lateral play to the drawbar of the engine to which the automatic coupler is attached, is a defect and a violation of the Federal Safety Appliance Act, and that no adjustment is permitted under the said act; thus denying to the defendant railway company in an action for damages for personal injuries under said act, the legal right to prove that said automatic coupler was properly equipped with safety appliances for manipulating it from the outside of the car, without the necessity of the plaintiff going between the car and the engine for the purpose of adjusting the knuckle of the coupler, and for kicking the drawbar with his foot.

2. In not holding upon the facts disclosed that the

negligence of the plaintiff was the direct cause of his injuries (Rec. pp. 142, 143).

3. In ruling that the coupler involved in this case was so constructed that in preparing it for use it was reasonably necessary for a man to place some part of his body in a hazardous position (Rec. p. 143).

4. In deciding that under the Federal Safety Appliance Act the automatic coupler in use by a railway company must be operative for each car as to the device of that particular car (Rec. p. 107).

5. In holding that the said act wholly abolished the defense of contributory negligence, and in refusing to allow plaintiff in error to plead said defense, and to submit evidence to the jury to sustain said plea in diminution of damages (Rec. p. 144).

6. In sustaining the ruling of the District Court striking out of the railway company's answer all the defenses therein set up except the general denial.

7. In ruling that the lateral play of the drawbar of the engine was a defect and a violation of the Federal Safety Appliance Act, and that no adjustment of the same is permitted under said act (Rec. pp. 125, 145).

III. ARGUMENT AND AUTHORITIES.

Said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, in sustaining the ruling of said district court, erroneously held that the lateral play to the drawbar of the engine to which the automatic coupler is attached which lateral play is made necessary for the purpose of rounding curves, and which required adjustment at times, is a defect and a violation of the Federal Safety Appliance Act, and, therefore, negligence *per se*, and that no adjustment is permitted under the said act; said holding being an erroneous construction of said act, thereby making a compliance with the provisions of the

same by plaintiff in error, San Antonio & Aransas Pass Railway Company, impossible of performance, and the ruling of the said district court, sustained by said Court of Civil Appeals, denied to said plaintiff in error its legal right to the defenses pleaded and the necessary proof to support the same, and thereby denied to said plaintiff in error its legal right to show by competent evidence that said automatic couplers were properly equipped with safety appliances for manipulating said couplers from the outside of the said car, and said engine, which avoided the necessity of said defendant in error going between said engine and said car for the purpose of adjusting the knuckle thereof, and for kicking said drawbar with his foot for the purpose of adjusting the knuckle thereof, and for kicking said drawbar with his foot for the purpose of alignment, which said plaintiff in error pleaded and was ready to prove, was contributory negligence on his part, and, in the absence of any violation on its part of any Federal statute enacted for the safety of employees, it was entitled to plead such contributory negligence and submit its evidence to sustain the same to the jury, in diminution of damages in proportion to the amount of negligence attributable to said defendant in error; which erroneous holding by said Court of Civil Appeals was manifest error, entitling plaintiff in error to a reversal of said cause (Rec. p. 142).

Adjustment of the Coupler.

Section 2 of the Safety Appliance Act of March 2, 1893, as amended by the Act of March 2, 1903, requires that all cars used on any railroad engaged in interstate commerce shall be equipped with couplers coupling automatically by impact, and which *can be* uncoupled without the necessity of men going between the ends of the cars. There is no provision in said act or amendment,

prohibiting or precluding adjustment of the coupler prior to or at the time of impact, or providing directly or indirectly that a drawbar out of alignment shall be regarded as a defect in the automatic coupler or equipment, nor is the fact that the drawbar being out of alignment, evidence *per se* of such defect, or that the cars are not equipped with couplers coupling automatically by impact or that they can not be coupled or uncoupled without the necessity of men going between the ends of the cars.

Morris v. *St. Louis, etc. Ry.* 158 S. W. 1055 (Tex. case);
Chicago, etc. Ry. v. *U. S.* 196 Fed. 882;
Willett v. *Ry.* 122 Minn. 513, 142 N. W. 883;
Chicago, etc. Ry. v. *Voelker*, 129 Fed. 526;
Sec. 2 Act Cong., March 2, 1893; Amendment March 2, 1903;
Sec. 5, Safety Appliance Act of 1893.

In order for the plaintiff to recover in an action for damages for personal injuries received by reason of the negligence of a common carrier, under Section 2 of the Safety Appliance Act, as amended by the Act of March 2, 1903, and to eliminate the defense by the carrier of contributory negligence on the part of plaintiff under Section 3 of the Employers' Liability Act, it must first be established that said Section of the Safety Appliance Act has been violated by the carrier by showing that its cars were not equipped with couplers coupling automatically by impact and that same *could not* be coupled and uncoupled without the necessity of men going between the ends of the cars, the test being whether the person operating the coupler is required, by reason of its defective condition, to go between the ends of the cars in order to effect a coupling or uncoupling.

Chicago, etc. Ry. v. *Voelker*, 129 Fed. 526;

Wheeling Terminal, etc. Co. v. *Russell*, 209 Fed. 795;
Johnson v. *Ry. Co.* 196 U. S. 1;
Chicago, etc. Ry. v. *United States*, 220 U. S. 559;
Delk v. *Ry. Co.* 220 U. S. 580;
Sec. 72a Thornton's Employers' Liability and Safety Appliance Acts, 1909 Ed.

The issues raised by defendant in the trial court in its special answer, stricken out by the court, whether or not its cars were properly equipped with couplers coupling automatically by impact, and whether they could be coupled and uncoupled without the necessity of plaintiff going between the ends of the engine and car, should have been submitted to the jury under all the evidence admissible by both plaintiff and defendant, it being necessary to establish the truth or falsity of the facts claimed by defendant in order to ascertain whether or not the Federal statute had been violated.

Texas & Pac. Ry. v. *Harvey*, 228 U. S. 518;
Richmond, etc. Co. v. *Powers*, 149 U. S. 43;
Chicago, etc. Ry. v. *Brown*, 229 U. S. 317;
United States v. *Denver, etc. Ry.* 163 Fed. 419;
Union Pac. Ry. v. *Brady*, 161 Fed. 717;
Suttle v. *Ry.* 144 Fed. 668;
Parker v. *Ry. Co.* 93 Atl. (N. J. Mar. 1915) 574.

Section 2 of the Safety Appliance Act of 1893, as amended by the Act of March 2, 1903, provides that all cars used on any railroad engaged in interstate commerce shall be equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars. Whether or not any such cars are so equipped, or can be coupled and uncoupled without men going between the

ends of the cars, is purely a question of fact and in a jury trial it is not the province of the court to determine these facts when disputed. The State courts have held in the instant case, as a matter of law, that a drawbar being out of alignment is a violation of the Federal Statutes and establishes the legal presumption that the common carrier is guilty of negligence. These courts go even further, and invading the long established general rules of pleading and evidence hold that the carrier has neither the right to plead nor prove why the drawbar was out of alignment, nor the right to adjust it when in such position, holding that adjustment is not permitted under the statute. At the same time the court adjudges damages to plaintiff by reason of injuries received while in the act of adjusting the coupler—an act not permitted under the statute, as the trial court instructed the jury (Rec. p. 98), without determining the fact as to whether or not there was a lever on the side of the car and engine. How could it be held that the engine and car could not be coupled without the plaintiff going between the ends of the cars? The fact that plaintiff went between the cars to prepare the knuckle of the coupler does not establish the legal presumption that this was necessary. The court holds that the proximate cause of the injury was the negligence of the defendant in having the drawbar of the engine out of alignment so that it would not couple by impact. Plaintiff in error contends that the proximate cause of the injury was the fact that plaintiff failed to pull the lever on the car at the time of the first impact, at which time the drawbar of the engine was in perfect and proper alignment. The Court of Civil Appeals bases its decision entirely on the condition and position of the drawbar as it was *after the first impact*, and the negligence of the defendant in having the drawbar on its engine "to be so" it would not couple automatically by impact, and

hence the Federal Statute was violated. The plaintiff himself testified there was nothing the matter with the coupler on the engine—it was the other car, the one to which the engine was being coupled (Rec. p. 63).

Negligence of Defendant in Error.

Plaintiff in the trial court averred in his petition that the defendant was negligent in having and permitting the couplers on said engine *and car* to be so that they would not couple automatically by impact, as required by law; and that this negligence of the defendant was the direct cause of plaintiff's said injuries (Rec. p. 2).

Defendant specially excepted to the foregoing allegation on the ground that same was insufficient to charge defendant with negligence and to put defendant upon notice and proof, because the same did not set out or allege any defect in the couplers as constructed on said cars nor alleged any defects in the maintenance of the couplers on said engine and cars which would charge defendant with a violation of law, State or Federal (Rec. p. 3); and answered specially that there was no defect in the coupling apparatus on its engine or car at the time of plaintiff's injury; that the said engine and cars were equipped with couplers coupling automatically by impact, as required by the Acts of Congress, and that while said coupling apparatus required adjustment before it would couple automatically by impact at the time of the accident complained of, there was no necessity of plaintiff going between the engine and cars while in motion, or in any manner endangering his personal safety to make such adjustment, but on the contrary he was prohibited from so doing by the rules of the defendant, and that his injuries resulted from such negligence and contributory negligence on his part, and not through any negligence on the part of defendant (Rec. p. 5).

Under the foregoing exception and special answer, which was stricken out by the court, plaintiff in error contends it was denied its legal right to prove and submit to the jury how and by what means, manner, appliance and equipment the coupling automatically by impact could have been made without the necessity of plaintiff going between the ends of said engine and car. The record shows that plaintiff came out of the house track on the footboard of the switch engine to couple on to two cars standing on the main line; that he coupled up against them, but they wouldn't make, because the pin in the coupler *on the car* wouldn't drop, and he stopped the engine and dropped the pin with his hands. (Rec. pp. 60, 62.) The pin on the coupling end of the engine was all right, it dropped. (Rec. p. 60.) When he got back on the footboard of the engine he then saw that the drawbar of the engine was shifted over to one side. (Rec. pp. 60, 62.) When he came back *the first time* to make the coupling the only reason the coupling did not make was that *the pin on the box car* did not drop to lock the coupling. The jaws of the drawhead of the locomotive came in like this (illustrating) and fit in there, so if this jaw had dropped there would have been a coupling—it was bound to have been. *When he came back the first time, the drawhead on the engine was in line with the drawhead on the box car*, that was bound to have been the case, because if it had not been the case the cars wouldn't have come together like they did—so that *the only thing that prevented the coupling the first time was the failure of the pin on the box car to drop.* (Rec. p. 65, plaintiff's testimony.) The record shows by plaintiff's own testimony that the drawbar of the engine was not out of alignment at the first impact; that the coupler on the end of the engine drawbar was all right; and the only reason the coupling was not made was that the pin in the

coupler *on the box car* would not drop. Plaintiff further testified that when the brakeman *couples a car he pulls a lever on the outside of the car, that opens the knuckle—that raises the pin and opens the coupler up, then all he has to do is to give a signal and they back right up.* He has nothing to do with reference to fixing the knuckle or anything of that sort. (Rec. p. 66.) Here we have the whole story in plaintiff's own words why the coupling was not made. Plaintiff neglected to step down off the footboard of the engine, go to the side of the box car, pull the lever placed there for that express purpose to raise the pin and open up the knuckle at the time of the first impact. The pin rested in a groove and could not drop unless raised by the lever or by hand. The impact, the knuckle being closed, shoved the drawbar of the engine out of alignment. What does plaintiff say as to this? When the cars came together and I failed to make that coupling, I didn't notice anything wrong with the coupler on the engine at all; *it was all with the other.* Now when they come together that way, and do not make a coupling, *sometimes that throws the drawbar out of line and sometimes it doesn't; it hit center in the coupling and the knuckle closed all right, but the pin wouldn't drop.* * * * I did not look at that time to see whether the drawbar of the engine was straight or out of line, *but it must have been straight or they wouldn't have come together,* wouldn't have coupled out of line, they wouldn't do it. (Rec. p. 63.) The record shows conclusively that the reason, and the *only* reason why the coupling was not made at the first impact was that the plaintiff failed and neglected to step down off the footboard of his engine, step to the side of the box car and raise the hand-lever *which raised the pin* at the time of the first impact. Had he done so the coupling would have been made and there would have been no accident. And yet the Court of Civil Appeals

bases its decision on the position of the drawbar of the engine at the time of the accident and the second impact, holding the defendant had violated the Federal statute by reason of the engine and car failing to couple by impact because the drawbar of the engine was out of alignment. In the face of all the foregoing testimony of the plaintiff, the Court of Civil Appeals says:

"It was not shown that there was a hand lever *on the engine* and therefore appellee (plaintiff) could not see (use) it, and *using the hand lever on the car to which the engine was to be coupled, if there was such lever, would not have adjusted the defective coupler on the engine.* It may have been contributory negligence for him to kick the defective knuckle, but that would not be a defense, because the defective coupling on the engine contributed to the injury." (Rec. p. 108.)

"Pulling a lever on the car would not have fixed the defective coupler on the engine. It was the latter that was out of adjustment and pulling the hand-levers of all the cars in the train would not have adjusted the engine coupler. The evidence showed that it could not be adjusted except by a man going between it and the car." (Rec. p. 109.)

There is no evidence in the record as to hand-levers on the engine and car by which adjustment of the couplers could have been made without the necessity of men going between the ends of the cars, because the trial court instructed the jury as follows:

"*The court having admitted before you certain testimony with reference to adjusting couplers on engines and cars on account of lateral play in order that they might couple automatically by impact; and the court being now of the opinion that such testimony is not admissible to prove any issue of this cause, I do now exclude the same from your consideration and direct you in considering your verdict in*

this case you do not consider any such testimony." (Rec. p. 98.)

On the pleadings and proof of plaintiff alone, the trial court, of its own motion should have instructed a verdict for the defendant, for the reason that plaintiff made no case against the defendant, of negligence and violation of the Federal Safety Appliance Act.

The plaintiff's failure and refusal to use the hand-lever on the side of the box car was in itself a violation of the Safety Appliance Act; for it has been directly held by the Federal courts that that act, which makes it the duty of common carriers to equip their cars with couplers which can be uncoupled "without the necessity of men going between the ends of the cars," imposes upon the employees the correlative duty of using these couplers when furnished, and of refraining from unnecessarily going between the ends of the cars to uncouple them; and failure of a servant to discharge this duty, which directly contributes to his injury, is fatal to an action for damages on account of it. *Gilbert* v. *Burlington, etc. Co.* 128 Fed. 529; *Union Pac. Ry.* v. *Brady*, 161 Fed. 719; *Suttle* v. *Ry.* 144 Fed. 668; *Morris* v. *Ry.* 108 Fed. 747; *Chicago, etc. Ry.* v. *United States*, 211 Fed. 12. Counsel for plaintiff in error have searched in vain for a decision by any court, either State or Federal, except the decision in the case at bar, where a common carrier has been held to have violated the Safety Appliance Act unless it has been pleaded and proved that there was either an absence of automatic coupler equipment, or that the same if present was either defective and out of repair, or failed to operate after one or more trials by manipulation of the hand-lever.

Defense of Contributory Negligence.

In the absence of any violation of the Federal Safety Appliance Act, contributory negligence is a legitimate defense by a common carrier in an action to recover damages for personal injuries, in order that the same may be diminished by the jury in proportion to the amount of negligence attributable to the person injured, the defendant in the trial court in the case being denied the right by the ruling of the court to plead this defense or introduce its evidence to sustain said plea.

Southern Ry. Co. v. *Snyder*, 205 Fed. 868;
Schlemmer v. *Ry. Co.* 220 U. S. 590;
Lloyd v. *Sou. Ry.* 81 S. E. (N. C.) 1003;
Delk v. *Ry. Co.* 220 U. S. 580;
Mondow v. *Ry. Co.* 223 U. S. 1;
Ellis's Adm'r v. *Ry.* 160 S. W. 512 (Ky.);
Cain v. *Southern Ry.* 199 Fed. 211;
Neil v. *Ry.* 22 Idaho, 74, 125 Pac. 331;
Norfolk, etc. Ry. v. *Earnest*, 229 U. S. 114.

The Court of Civil Appeals held that " under the facts of this case neither proof of assumed risk nor of contributory negligence offered any defense. The uncontroverted evidence showed that if the engine had been equipped with a lever by which the coupler could have been adjusted without the necessity of going between it and the car, there would have been no accident " (Rec. p. 89). But suppose the plaintiff negligently failed or refused to use the lever, as in the instant case? Besides there is no evidence " uncontroverted " or otherwise as to whether either engine or car was equipped with a lever " by which the coupler could have been adjusted "; this testimony as to adjustment being ruled out by the trial court.

Said court further held: " If appellant did not have

the coupler *on its engine* so arranged that it could be adjusted from the outside it violated the law, and it does not matter what appellee may have done if the defective coupler contributed to his injury, and appellant is liable" (Rec. p. 108).

Proximate Cause of the Injury.

Plaintiff in error respectfully submits that there are altogether too many "ifs" in the case at bar to warrant a judgment against it of having violated the Federal Safety Appliance Act. As has already been shown, the proximate cause of the injury was not the defective condition of the engine coupler or equipment, but the negligence of plaintiff in failing to use the equipment on the *box car*. Plaintiff's whole cause of action is founded upon his own gross negligence,—he created the suit by his own conduct. His pleading shows that he rests his case on the result of this negligence by his allegation that "for the purpose of making said coupling it became necessary for plaintiff to stand upon the footboard of said engine, between said engine and car, and to shove the knuckle of the coupler *on said engine* so as to bring it into proper position to make the coupling as aforesaid" (Rec. p. 2, top page). Why not in proper position? Because the drawbar was thrown out of alignment by reason of his failure to use the hand-lever on the *box car* at the time of the first impact. The elimination by the court of all defenses as to contributory negligence in its rulings as heretofore shown, and in its charge to the jury (Rec. pp. 7, 8), as well as all evidence as to adjustment of the couplers, absolutely assured plaintiff of a verdict and recovery. The Court of Civil Appeals in its findings and decision, systematically ignores the testimony of plaintiff up to and including the time of the first impact. There is where the trouble originated—there was the

proximate cause. Shall defendant in error profit by his own wrong, with not one line of evidence in the record, that the defendant in the case in any way, shape or manner violated the Federal law regulating the safety appliances with which its cars were presumably equipped?

Said Court of Civil Appeals erroneously held in construing the Federal Safety Appliance Act, that, as a matter of law, said statute was violated by plaintiff in error San Antonio & Aransas Pass Railway Company, by reason of the position of the drawbar on the engine, holding that such position of the drawbar disclosed a defect in the coupler and that said defective coupler on said engine contributed to the injury, for the reason that the record shows the defendant in error's negligence alone was the cause of the drawbar being out of alignment, he having failed to use the safety device or lever at the side of the car for the purpose of adjusting the knuckle of the coupler on the car to which the engine was sought to be coupled, prior to the first impact which caused the misalignment, which act of negligence on the part of defendant in error was the cause of the failure to couple, the kicking of the drawbar for the purpose of alignment being the direct cause of his injuries; the erroneous holding of said Court of Civil Appeals declaring the deflected position of the drawbar disclosed a defect in the automatic coupler, denied the plaintiff in error its legal rights and defenses under said Act and under the general rules of pleading and evidence, for which it is entitled to reversal of said cause. (Rec. pp. 142, 143.)

If a correct construction of section two of the Safety Appliance Act imposes upon common carriers the absolute duty of equipping their engines and cars with couplers coupling automatically by impact and which can be coupled and uncoupled without the necessity of men going between the ends of the cars, and further interprets

a deflected drawbar at the time of such impact to be a defect or insufficiency in said coupler, then, in order to show a violation of the statute by the carrier and afford an employee a cause of action under the Employers' Liability Act, it must be proved that the misalignment of the drawbar at the time of such impact, was due to the negligence of the carrier, before he will be entitled to recover damages for injuries sustained.

Seaboard Air Line Ry. v. *Horton*, 233 U. S. 492;
Grand Trunk Ry. v. *Lindsay*, 201 Fed. 837;
Grand Trunk Ry. v. *Lindsay*, 233 U. S. 42;
Pennsylvania Co. v. *Cole*, 214 Fed. 948;
Sec. 1 Employers' Liability Act, 1908.

Section one of the Liability Act provides that the common carrier by railroad shall be liable for injuries resulting in whole or in part, by reason of any defect or insufficiency, *due to its negligence*, in its appliances or other equipment. Mr. Justice Pitney, in the *Seaboard Air Line* case, *supra*, in construing this section of the act said:

"This clause has two branches; the one covering the negligence of any of the officers, agents or employees of the carrier, which has the effect of abolishing in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. But, plainly, with respect to the latter, as well as the former ground of liability, *it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence* * * * To hold that under the statute the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., *however caused*, is to take from

the Act the words '*due to its negligence.*' The plain effect of these words is *to condition the liability upon negligence;* and had there been doubt before as to the common-law rule, *certainly the act now limits the responsibility of the company as indicated.*"

Strained Construction of Statutes.

The effect of the decision of the Court of Civil Appeals is, as plaintiff in error contends, to hold it liable regardless of any negligence shown on the part of the defendant in the trial court, and regardless of whether or not plaintiff by his own negligence and carelessness, caused the drawbar of the engine to be out of alignment. It is submitted that this interpretation of the Employers' Liability and Safety Appliance Acts is pushing the rule of construction beyond all boundaries of reason, and imposes upon the employer an absolute responsibility for the condition *and position* of the drawbar, instead of limiting the responsibility as provided in the Act. Judge Sanborn holds in the *Lindsay* case, in construing the Employers' Liability Act, that when the plaintiff's act is the sole cause of the injury—when defendant's act is no part of the causation—*that defendant is free from liability under the act.*

It is an easy proposition for a court to assume that an engine or car is not properly equipped or defectively equipped with automatic couplers, or appliances, or hand-levers, and therefore the railway carrier is guilty of negligence, and proceed to apply the law in accordance with such assumption; but the legal presumption is all the other way,—the presumption being that the cars are properly equipped; that the carrier has obeyed the law. And the burden of proof is upon plaintiff to show that the carrier has not complied with the law before he is entitled to recover. There is not a line of evidence in

the record that the defendant had not complied with the law in the equipment and maintenance of its automatic couplers, or that they would not couple automatically by impact. There was no evidence admitted as to the hand-levers, because those appliances are used solely for the *adjustment* of the couplers so they will couple automatically by impact, *and all testimony as to adjustment was ruled out by the court.*

Said Court of Civil Appeals erroneously held, in construing said Federal Safety Appliance Act, that the same was violated, if in preparing a coupler for use it was reasonably necessary for a man to place a part of his body, arm or leg in a hazardous position; while said act as construed by the Federal Courts declares the same to be violated when the coupling apparatus *was so constructed* that in preparing a coupler for use, it was reasonably necessary for a man to place some part of his body in a hazardous position, the defect in the construction thereby creating the necessity for preparation for use by assuming a hazardous position. There being no evidence in the record other than the unsupported testimony of defendant in error that there was any necessity for him to go between the cars or kick the coupler with his foot, and there being no evidence in the record of any defect in construction of said coupling appliance or of said automatic coupler, the court in effect held that the fact that he did go between the cars and kick the knuckle of the coupler with his foot conclusively showed that said act was violated and that said plaintiff in error was therefore liable for any damage sustained by him; said holding and decision by said Court of Civil Appeals being manifestly erroneous, entitling plaintiff in error to a reversal of the case. (Rec. p. 143.)

In construing the Safety Appliance Act, the Court of Civil Appeals stated in its opinion that it is held that the

act is violated if "in order to open the knuckle when preparing the coupling for use it was reasonably necessary for a man to place part of his body, his arm, or his leg in a hazardous position," citing *United States* v. *Railway* 167 Fed. 695 (Rec. p. 107), while the court in that case instructed the jury that "when the coupling and uncoupling apparatus on either end of said car was so constructed that, in order to open the knuckle when preparing the coupler for use, it was reasonably necessary for a man to place part of his body, his arm, or his leg in a hazardous or dangerous position," the statute was violated; the distinction being that under the construction of the Court of Civil Appeals the question of defect, insufficiency or inoperative condition of the coupling appliance, or the use of the hand-lever, is entirely eliminated, leaving the use and operation of the hand-lever solely in the discretion of the employee, and hence the violation of the statute is dependent exclusively upon his testimony as to the necessity of assuming a hazardous position.

See Opinion Court of Civil Appeals, Rec. p. 107;
United States v. *Railway*, 167 Fed. 695;
United States v. *Atchison, etc. Ry.* 167 Fed. 696.

What the facts were in the *United States-Nevada County, etc. Ry.* case is not shown, but in the very next case—the *Atchison Ry.* case at page 696 of 167 Federal Reporter, decided three days later by the same judge, it was held in effect that the coupler must be discovered in "a defective and inoperative condition" before the statute would be violated. This is a reasonable construction of the statute. In all cases heretofore decided the facts have shown that the employee had first tried the hand-lever to manipulate the coupler before going between the ends of the cars, and the lever had failed to work. In the case at bar this is

not shown, nor, under the decision of the Court of Civil Appeals, is this required, in order to show a violation of the statute.

Said Court of Civil Appeals has erroneously construed said Federal Safety Appliance Act in holding that said statute requires that the automatic coupler in use by said plaintiff in error, must be operative for each car as to the device of that particular car, so that defendant in error or other employee would not have to go to another car to make the coupling of the car in question; for the reason that said Safety Appliance Act requires only that each car must itself be completely equipped with couplers coupling automatically by impact, no requirement being specified as to operative devices of each particular car or otherwise, and such erroneous construction of said Court of Appeals imposes an additional burden upon said plaintiff in error not required by the statute, in that under said construction of said act said plaintiff in error is required to provide separate coupling devices operative for each car as to the device of that particular car; whereas, the coupling devices and appliances now in use by plaintiff in error, as would have been shown, if allowed, require the manipulation of a coupling device on only one particular car in order to completely control and effect a coupling automatically by impact with any connecting car, which said plaintiff in error was ready to prove had it been permitted to introduce evidence as to the necessary adjustment of said automatic couplers, which was denied by the ruling of the district court and sustained in its ruling by said Court of Civil Appeals; the holdings of said courts being manifestly erroneous, entitling said plaintiff in error to a reversal of said cause.

The Court of Civil Appeals having held that the automatic coupler in use by plaintiff in error at the time of the accident should have been *operative for each car as to*

the device of that particular car, in order that an employee *would not have to go to another car to make the coupling of the car in question*, such construction of the Federal Safety Appliance Act imposes upon plaintiff in error and upon interstate commerce a double burden in that such interpretation, if sustained by this court, will require two employees, one at each car, in order to make the coupling now effected by one, and would thereby increase two-fold, not only the operating expense of plaintiff in error, but of every carrier by railroad throughout the United States.

Wabash, etc. Ry. v. *United States*, 168 Fed. 1;
United States v. *Montpelier, etc. Ry.* 175 Fed. 874;
United States v. *Ry.* 162 Fed. 403.

Erroneous Application of Federal Authorities.

The Court of Civil Appeals in its opinion on motion for rehearing made by appellant (plaintiff in error here) lays down the following proposition as having been established by the Federal courts, setting forth the same in quotation:

"The statute concerning the coupling devices requires that the automatic coupler in use must be operative for each car as to the device of that particular car, so that an employee of a railroad company would not have to go to another car to make the uncoupling of the car in question," citing *United States* v. *Ry.* 168 Fed. 1; *U. S.* v. *Ry.* 162 Fed. 403. Neither of the cases cited has any such language in the opinion, the nearest language used being in the former case, where Judge Baker, Circuit Judge, uses the following language: "Under the act each car is a unit and must itself be completely equipped so that trainmen may go about their work without charging their memories with differences between cars," which is a vastly different statement than the one used by the court

of civil appeals in this case that coupler "must be *operative* for each car as to the device of that particular car." (Rec. p. 107.)

In the Montpelier Railway case above cited, which has never been overruled, it was held that the use by a railroad company of a switch engine having no "uncoupling levers" does not subject it to the penalty imposed by the Safety Appliance Act for using a car "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars," *in the absence of proof that such levers are necessary to enable such engine to couple to cars by impact, and especially where it is shown that it can be uncoupled without the necessity of going between it and the car to which it is coupled.* Whether the engine and car, in the case at bar, were equipped with hand-levers, is not shown in the record, for the reason that these levers are used for the purpose of adjustment of the couplers, and the trial court and court of civil appeals ruled that adjustment of the couplers was not permissible under the act and evidence thereof was not admissible. The suggestion of the latter court that "it was not shown that there was a hand-lever on the engine and therefore appellee could not use it" (Rec. p. 108) was purely academic and hypothetical, because the only reason it was *not* shown was the fact that the defendant in the trial court was prohibited by the ruling of that court from so doing. (Rec. p. 98.)

Said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas erred in sustaining the ruling of the district court in striking out plaintiff in error's plea of contributory negligence on the part of defendant in error, and in holding that the Federal Employers' Liability Act wholly abolished the defense of contributory negligence, and in refusing to allow plaintiff in error to plead

said defense and submit evidence to the jury to sustain said plea even in diminution of damages, said plaintiff in error having specially denied and offered to prove that it in no wise had violated said act or any statute enacted for the safety of employees, nor had such violation contributed in anywise to the injury of said defendant in error, nor had such injuries resulted in whole or in part from the negligence of any of the officers, agents, or employees of said plaintiff in error, nor by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment, said court holding that plaintiff in error, San Antonio & Aransas Pass Railway Company, was guilty of negligence as a matter of law on the unsworn allegations of defendant in error in his petition, and refusing to allow said plaintiff in error to specially deny or disprove said unsupported allegations by either pleading or proof; which ruling of said trial court, sustained by said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, was manifest error on the part of said courts for which plaintiff in error is entitled to a reversal of said cause (Rec. p. 144).

Competent Evidence Ruled Out.

In refusing to admit in evidence testimony showing that adjustment at times was necessary before the coupler would couple automatically by impact, the trial court thereby eliminated all expert testimony as to equipment and operation of the hand-lever at the side of the car, and in holding that a deflected drawbar was a defect and insufficiency in the coupler of the engine under the Safety Appliance Act and due to the negligence of defendant, without any evidence to support it, the court denied to defendant the defense of contributory negligence on the part of plaintiff in the trial court, permissible under the

Employers' Liability Act where there is no defect or insufficiency due to the negligence of the carrier, said courts holding as a matter of law that plaintiff in error had violated the Safety Appliance Act, and precluded it from proving under its special answer, the equipment of the car and couplers with a hand-lever, and the negligence of the plaintiff in failing to use the same in preparing the couplers for coupling automatically by impact, which failure was negligence and proximately caused or contributed to cause the injuries complained of.

United States v. *Montpelier, etc. Ry.* 175 Fed. 874;
Wheeling, etc. v. *Russell*, 209 Fed. 795;
Johnson v. *Ry.* 196 U. S. 1;
Chicago, etc. Ry. v. *U. S.* 220 U. S. 559;
Delk v. *Ry.* 220 U. S. 580;
Long v. *Ry.* 155 Ky. 286;
Helm v. *Ry.* 156 Ky. 240;
Ellis's Adm'r v. *Ry.* 155 Ky. 745;
Devine v. *Ry.* 259 Ill. 449;
Grand Trunk Ry. v. *Lindsay*, 201 Fed. 837;
Grand Trunk Ry. v. *Lindsay*, 233 U. S. 42.

In order to hold plaintiff in error liable for violation of the Safety Appliance-Employers' Liability Acts, it must be shown that the employee's injuries resulted in whole or in part by reason of some defect or insufficiency in its couplers, *due to its negligence*, on the car or engine in question; and it must further be shown that a reasonable effort was made to operate the coupler by hand-lever and the same failed to work by that means, before such employee would be justified in going between the ends of the cars.

Nicholas v. *Ry.* 195 Fed. 913;
Chicago, etc. Ry. v. *Brown*, 229 U. S. 317;
Burto v. *Ry.* 121 Minn. 326;

Morris v. *Ry.* 158 S. W. (Tex.) 1055;
United States v. *Ry.* 156 Fed. 182, 193.

There was no evidence on the trial of this case that the plaintiff made any effort whatever to use the hand-lever to operate the coupler at any time before going between the ends of the cars or before kicking the coupler into position with his foot. In truth, all the testimony offered distinctly evidenced the fact that he did not. The plaintiff charged in his petition that the defendant permitted the couplers on said engine *and car* "to be so" they would not couple automatically by impact (Rec. p. 2); and when the defendant specifically denied the charge,—raised its voice in righteous protest, and offered to prove that plaintiff himself caused the coupler *to be so* it would not couple,—the official hand of the court was promptly clapped over the protestant's mouth, and held there until the jury returned its verdict on *ex parte* testimony. Those are the facts as shown on the record, and no amount of technical quibbling can evade them.

The record shows that the attempted coupling, causing the injuries for which damages are sought in this suit, took place upon a straight track, thus eliminating the issue submitted to the jury in the Willett case, cited under first point stated under first assignment of error in this brief, and decided by the Supreme Court of Minnesota, July 25, 1913. In the Willett case coupling was attempted on a curved track, plaintiff alleging that the automatic couplers were defective within the meaning of the Federal Safety Appliance Act because the drawbars were out of alignment. It was held in that case that the court could not say, as a matter of law, that the couplers were not defective under said act, nor that the coupling was attempted at an improper place, *and that these questions were properly submitted to the jury.* The facts were

almost identical with the facts in the case at bar, except that the track was curved instead of straight. The report of the Willett case does not indicate the nature of the pleadings, but does reflect that all issues were submitted to the jury, and whether or not the drawbars were defective in that case, as in this, was a question of fact to be found by the jury. If the court can not say, as a matter of law, that the couplers are *not* defective within the meaning of the Safety Appliance Act, as a natural and reasonable corollary, it can not say, as a matter of law, that the couplers *are* defective, within the meaning of that act. It is a matter of common knowledge that the hand-lever of all automatic couplers is a necessary part of the automatic coupler, and its use by the railway employee the sole means of safeguarding his life and limbs, and that it is placed on the side of the car for the express purpose of avoiding the necessity for him to go between the ends of the cars in making the coupling. The modern hand-lever takes the place of the stick imposed by the rules of most railroad companies, under the old link-and-pin coupling of earlier days. Prior to the enactment of the Safety Appliance and Employers' Liability Acts, it was uniformly held by both State and Federal Courts to be contributory negligence on the part of the employee to disregard the rules of the company by going between the cars for the purpose of adjusting the pin by hand, when a stick was provided for that purpose and required to be used; and disregard of such rule and failure to use the stick, was contributory negligence which precluded recovery for injuries sustained thereby. It is plaintiff in error's contention in the case at bar, that defendant in the trial court should have been permitted to offer evidence showing that it was necessary to adjust the coupler for automatic coupling by the use of the hand-lever at the side of *the car*. The State Courts tenaciously

cling to the bold proposition that it was the condition of the drawbar and coupler *on the engine* which caused the injuries complained of. As stated, the plaintiff alleges in his petition that the couplers attached to said engine *and car* would not couple automatically, etc. (Rec. pp. 1, 2), and defendant below was clearly entitled under the plainest rules of pleadings and evidence, to show necessary adjustment of the coupler *on the car*, by the use of the hand-lever placed there for that particular purpose. This proposition seems so plain and elementary that counsel for plaintiff in error only present it to avoid the possible holding that the error or issue is waived by silence in his brief.

Said Court of Civil Appeals erred in overruling plaintiff in error, San Antonio & Aransas Pass Railway Company's, first assignment of error and in sustaining the ruling of the district court striking out of its answer all the defenses therein set up except the general denial, for the reason that in order for a defendant to avail himself of a Federal statute or a plea of contributory negligence, the same must be specially pleaded, and the trial court, in striking out of said plaintiff in error's pleas, arbitrarily denied to it the legal defenses afforded under said Federal Safety Appliance Act and said Federal Employers' Liability Act therein specially pleaded, and further denied to said plaintiff in error the defense of contributory negligence to defendant in error's claim for damages, which under said statutes was available, in the absence of negligence on its part as provided in said liability act, if sustained by proof, in order to diminish the amount of damages claimed, the same being a question of fact to be determined by the jury, and the denial to said plaintiff in error of said defenses as aforesaid, was fundamental error, requiring the reversal of said cause.

Texas Decisions on Negligence.

Under the rules of practice and the decisions of the Texas courts when either a foreign statute or contributory negligence is relied on as a defense the same must be specially pleaded and proved, unless it appears from the pleading of plaintiff.

(Foreign Statute.)

Elethen v. *Bonner*, 93 Tex. 143;
Gill v. *Everman*, 94 Tex. 209;
Railway v. *Moody*, 71 Tex. 614;
Porcheler v. *Bronson*, 50 Tex. 555;
Armendiaz v. *Serna*, 40 Tex. 304;
Anderson v. *Anderson*, 23 Tex. 641;

(Contributory Negligence.)

Canadian, etc. Ry. v. *Clark*, 73 Fed. 76;
New York, etc. Ry. v. *Thierer*, 221 Fed. 571;
Railway v. *Watson*, 72 Tex. 631;
Railway v. *Porter*, 73 Tex. 304;
Railway v. *Bennett*, 76 Tex. 151;
Brown v. *Sullivan*, 71 Tex. 470;
Gulf, etc. Ry. v. *Shielder*, 88 Tex. 152;
Art. 1902 Rev. Stats. Texas, 1911.

The construction placed upon the practice and procedure acts by the highest court of a State, and as to the sufficiency of the pleadings, is binding upon the Federal courts.

Iowa Central A. Co. v. *Iowa*, 160 U. S. 389;
Halferty v. *Wilmering*, 112 U. S. 713;
Grand Rapids, etc. Ry. v. *Butler*, 159 U. S. 87.

Said Court of Civil Appeals committed manifest error in holding that the lateral play of the drawbar of the

engine is a defect and violation of the Federal Safety Appliance Act and that no adjustment of the same is permitted under said act, as set out in plaintiff in error's sixth assignment of error in its application to the Supreme Court of Texas for a writ of error (Rec. p. 125) for the reason that if such construction of said act be correct, the effect thereof makes a compliance with the provisions of said statute a practical impossibility by plaintiff in error, would require the abandonment of its business as a common carrier and result in an arbitrary confiscation of its property without due process of law; for which manifest error in the construction of said act plaintiff in error is entitled to a reversal of said cause. (Rec. p. 145.)

The error claimed to have been made by the Court of Civil Appeals, in construing the Federal Safety Appliance Act as set out in the seventh assignment, is sufficiently covered under the First Assignment of Error in this brief.

Explanation.

As plaintiff in error understands the practice in this court, as set out in paragraph 4 of Rule 21, plain errors may be noticed although not assigned and annexed to the transcript or application for the writ; and while the errors we shall presently refer to are what may be called, for a better term, accumulative errors, and dependent upon a preceding error, following after in consequential sequence, they may none the less be vital in their effects, we shall therefore briefly refer to two or three errors, properly assigned in the trial court, the Court of Civil Appeals and in the application to the Texas Supreme Court for writ of error (Rec. pp. 18, 19, 21, 124), but not assigned as error in this court, the same having reference to charges given and refused by the trial court.

First Additional Assignment of Error.

The Court of Civil Appeals committed manifest error in sustaining the first three paragraphs of the main charge of the trial court, which are as follows:

In this cause the court charges the jury as follows:

I

"If you find from the evidence that at the time of the accident the defendant's locomotive and car to which it was attempted to couple the locomotive were not equipped with couplers coupling automatically by impact, without the necessity of plaintiff's going between the ends of the cars; and if you further find from the evidence that by reason of such fact (if found by you) and as the proximate result thereof the plaintiff received any of the injuries complained of by you, you will find for the plaintiff."

II.

"If you find from the evidence that said locomotive and car of defendant at the time of the accident, were equipped with couplers coupling automatically by impact, without the necessity of plaintiff's going between the ends of the cars, you will find for the defendant.

III.

"If you find for the plaintiff and believe from the evidence that he sustained any of the injuries alleged in his petition, then you should allow him such sum as you believe from the evidence will fairly compensate him for the injuries received, if any, which are alleged in his petition and which you find from the testimony to have been sustained, if any were sustained; and in estimating the damages you award the plaintiff, if any, you may take into consideration the mental and physical pain, if any, suffered by him consequent upon such injuries, if any, and the time, if any, he has lost in consequence of his injuries, if any; and if you believe from the evidence

that such injuries, if any, are permanent and will impair his capacity to labor and earn money in the future, then you may award him such sum as you believe from the evidence will fairly compensate him for such impaired capacity, if any, to labor and earn money in the future," (Rec. pp. 7, 8);

for the reason that plaintiff's cause of action was based on the allegation that the defendant was negligent in having and permitting the couplers on said engine *and car* to be so that they would not couple automatically by impact, as required by law, and that this *negligence* of the defendant was the direct cause of plaintiff's said injuries (Rec. p. 2), and said charge of the court wholly omitted to submit to the jury any question or issue as to whether or not said failure to couple automatically by impact at time of the accident, *was due to defendant's negligenee*, as provided in Section 1 of the Federal Employers' Liability Act, under which plaintiff was entitled to recover, if at all, which act precluded the defense of contributory negligence against plaintiff in any case where the violation by defendant of the Safety Appliance Act contributed to the injury of plaintiff.

The court having held that the defense of contributory negligence was not available to defendant in any case where the violation of the Safety Appliance Act by it was charged, necessarily brought plaintiff's right to recover within the Federal Employers' Liability Act, and the charge of the court, sustained on appeal, that the verdict of the jury in favor of plaintiff depended solely upon the finding that defendant's locomotive and car were not equipped with couplers coupling automatically by impact, without the necessity of plaintiff's going between the ends of the cars, excluded entirely any consideration by the jury of any questions of defect or insufficiency in, and any questions of, negligence or contributory negligence

in operating or omitting to operate coupling appliances by plaintiff, or whether or not any necessity existed for plaintiff to go between the engine and car to adjust the same.

The charge of the court, sustained on appeal, which omitted to instruct the jury as to the law of negligence or contributory negligence, was an assumption by the court that defendant had violated the Safety Appliance Act, in which event contributory negligence was not a bar to plaintiff's right to recover, and logically followed in order and sequence the elimination of defendant's special exceptions and special defenses and the exclusion of all evidence as to adjustment of the couplers prior to the impact, and sustained the allegation of plaintiff, without evidence to support it, that it was necessary for him to go between the ends of the cars to effect a coupling.

Grand Trunk, etc. Ry. v. *Lindsay*, 233 U. S. 42;
Seaboard, etc. Co. v. *Horton*, 233 U. S. 492.

The charge of the court, sustained on appeal, requires a reasonable construction of the meaning of the phrase, "coupling automatically by impact without the necessity of men going between the ends of the cars," and this necessarily involves the mechanical construction of the coupler and the appliances provided under the Safety Appliance Act and the means supplied for its operation in order to avoid such necessity, and these facts could not be found by the jury, under the court's instructions, after excluding all testimony as to adjustment of the couplers.

The charge of the court, sustained on appeal, presented to the jury questions for determination which could only be raised by the Federal Government under Section 6 of the Safety Appliance Act, in a suit brought by the United States District Attorney in the Federal District Court, in

which a penalty of only one hundred dollars for each violation is permitted to be recovered, and neither the cause of action nor the penalty thereunder inures to a private person seeking damages in case the statute is violated.

The charge of the court in submitting the bare question as to whether or not defendant's locomotive and car were equipped with couplers coupling automatically by impact without the necessity of plaintiff's going between the ends of the cars, caused the injuries complained of, wholly excluded from the jury the consideration of the question whether such injuries resulted in whole or in part from the negligence of any of the officers, agents, or employees of defendant, or were caused by reason of any defect or insufficiency, *due to defendant's negligence*, in its cars, engines, etc., as provided by the Employers' Liability Act, under which act alone defendant was liable to plaintiff, if at all, otherwise, plaintiff had no right of action, for the reason that the violation of the Safety Appliance Act by defendant, in the matter of defective or insufficient appliances while engaged in commerce between the several States, was a question open for inquiry by the Federal Government alone, under the penal clause of that act, no question of negligence being submitted to the jury, of either plaintiff or defendant, the cause of action upon which plaintiff sought to recover—defendant's negligence—was wholly left out of the case by the court's charge. The court having usurped the authority of the Federal Government, under Section 6 of the Safety Appliance Act, in submitting the question of defendant's violation of Section 2 of said act, proceeded to instruct the jury that if they believed from the evidence that plaintiff sustained any of the injuries alleged in his petition, then they should allow him such sum as they believed from the evidence would fairly compensate him

for the injuries received, etc. (Rec. p. 7). It being conceded that plaintiff's cause of action, if any he had, arises under the Employers' Liability Act of April 22, 1908, and his petition clearly shows his claim for recovery is based upon defendant's negligence as specially provided in said act, it is a surprising circumstance that the trial court should eliminate from its charge every element of the statute which gave plaintiff the right to recover, even to the extent of excluding the application of the act altogether,—instructing the jury, by implication, that it need not consider at all the fact as to whether or not the failure of the coupler to couple automatically by impact was due to defendant's negligence, and, further, whether plaintiff was guilty of negligence was not a question in the case. The theory upon which the trial court submitted the case to the jury, fully sustained by the Court of Civil Appeals, is so untenable as to require no argument or authority to repudiate it. The record alone is sufficiently convincing.

Second Additional Assignment of Error.

The trial court erred in refusing, and the Court of Civil Appeals erred in sustaining said refusal, to give special charge No. 7 requested by defendant, which was as follows:

"If you find from the evidence that the coupling apparatus on the engine and tender of defendant was out of adjustment at the time of the accident so that it would not couple automatically by impact by reason of any acts of the plaintiff, then, you will find in favor of the defendant," (Rec. p. 12), it being the contention of defendant that plaintiff's negligence caused and contributed to cause the the injuries complained of for which defendant was in no wise liable or responsible, and the refusal of the court to give said requested charge was an erroneous construction

of the Safety Appliance and Employers' Liability Acts and thereby held that defendant had violated said acts as a matter of law without evidence to support it.

If the coupling apparatus on the engine was out of adjustment by reason of any acts of the plaintiff, and said acts caused said coupling to be so that the couplers would not couple automatically by impact, as alleged in plaintiff's petition, and it thereupon became necessary for him to go between said engine and car for the purpose of shoving said coupler into position to make the coupling, all of which acts could have been avoided by using the hand-lever on the side of the car, then said acts on the part of plaintiff constituted negligence, and were the proximate cause of his injuries, and were therefore proper questions to be submitted to the jury for their findings as to the facts.

Third Additional Assignment of Error.

The trial court erred in refusing, and the Court of Civil Appeals erred in sustaining said refusal, to give special charge No. 8 requested by defendant, which was as follows:

"If you find from the evidence that the coupling apparatus on defendant's engine and tender was in such condition that it would couple automatically by impact when the first attempt to couple defendant's engine and car was made, and you find that the drawbar of said coupling apparatus was out of adjustment when the second coupling was attempted, and that such condition resulted from the acts of the plaintiff, then, you will find in favor of the defendant" (Rec. pp. 12, 13); for the reason that if said coupling apparatus was not out of adjustment at the time of the first impact and only became so because of plaintiff's failure to use the hand-lever on the car, and such omission by him was negli-

gence, which negligence was the cause of the drawbar being out of alignment at the second impact and he sustained his injuries by reason thereof, these facts, if found by the jury would have relieved defendant from all liability in the premises and required an instructed verdict in favor of defendant.

Special charge No. 8 requested by defendant and refused by the court, squarely presented to the jury the question whether the injuries sustained by plaintiff were due to the negligence of defendant or were caused by his own negligence in failing to use the hand-lever on the side of the car. The refusal to submit this charge and failure to instruct them on any phase of contributory negligence, as evidenced by the main charge of the court (Rec. pp. 7, 8) made it arbitrary on the part of the jury, if they found plaintiff at all injured, to find that his injuries necessarily resulted from a violation of the Safety Appliance Act by the defendant.

The refusal of the court to give special charges 7 and 8, in the light of paragraphs one and three of the main charge, the court having ruled out all testimony as to adjustment of the couplers, holding that adjustment was not permitted under the Safety Appliance Act, and that the engine and car must at all times couple automatically by impact, brought the defendant on the trial to the bar of justice, a mute and shackled culprit, forced to receive a pre-judged sentence for an act which, under all rules of pleading and evidence, it could easily have disproved. This is a strong indictment, but does not the record sustain the charge here made? Has it not been clearly shown in this brief under the First Assignment of Error, (*a*) that all testimony as to adjusting the couplers was excluded from the jury (Rec. p. 98); (*b*) that all special defenses of defendant, including necessary adjustment of the couplers and contributory negligence were stricken out

by the court (Rec. pp. 6, 7); (c) that the only reason that coupling did not "make" at the first impact was the failure of the pin on the box car to drop, plaintiff testifying: "When I came back the *first time* to make this coupling *the only reason that the coupling did not make was that the pin on the box car did not drop to lock the coupling.* The jaws of the drawhead of the locomotive come in like this (illustrating) and fit in there, so if this jaw had dropped there would have been a coupling, —it was bound to have been; *when I came back the first time the drawhead on the engine was in line with the drawhead on the box car,* that was bound to have been the case, because if it had not been the case the cars wouldn't have come together like they did,—*so that the only thing that prevented the coupling the first time was the failure of the pin on the box car to drop* (Rec. p. 65, re-cross examination). * * * When the brakeman couples a car *he pulls a lever on the outside of the car, that opens the knuckle—that raises the pin and opens the coupler up,* then all he has to do is to give a signal and they back right up. He has nothing to do with reference to fixing the knuckle or anything of that sort (Rec. p. 66). * * * *Now when they come together that way and do not make a coupling, sometimes that throws the drawbar out of line and sometimes it doesn't; it hit center in the coupling and the knuckle closed all right, but the pin wouldn't drop*" (Rec. p. 63); *that after the striking out of defendant's special answer, excluding adjustment and contributory negligence, the Court of Civil Appeals held* (d) *that under the facts of this case neither proof of assumed risk nor of contributory negligence offered any defense* (Rec. p. 89).

Fundamental Error.

One of the conspicuous errors in this case, as shown on the face of the record, as plaintiff in error views it,

is the failure of plaintiff to allege anywhere in his petition facts sufficient to bring his cause of action, or right of recovery, within the purview of the Federal Employers' Liability Act. There is neither allegation nor proof that plaintiff, at the time of the accident, was employed by the defendant in interstate commerce nor is there allegation or proof that defendant at the time was engaged in interstate commerce. The petition alleges that on or about a certain date "plaintiff was in the employ of the defendant as a brakeman; and on said date the defendant was and it still is a comm carrier by railroad, engaged in both interstate and intrastate commerce; and on said date, at the station of Kenedy on the line of the defendant railroad, the defendant then and there used on said railroad in interstate commerce and in intrastate commerce a certain engine and a certain car; and it became and was the duty of plaintiff then and there to couple the aforesaid engine and car together" (Rec. p. 1). Is this allegation sufficient? The Court of Civil Appeals holds that it is (Rec. p 110). The defendant specially excepted to the sufficiency of the allegation (Rec. p. 3). *Peterson* v. *Railroad Company*, 229 U. S. 146; *Railway Company* v. *Seale*, 229 U. S. 156. In the *Seale* case, last cited, it was held that in order to determine which of two statutes, State or Federal, was applicable, turned upon whether the injuries were sustained while the company was engaged and while plaintiff was employed in interstate commerce or intrastate commerce. It was further declared in that case that both statutes could not occupy the same field. Under the allegations in plaintiff's petition in this case, how is it to be determined which statute applies? Plaintiff in error contends that under the decisions of this court, both the general demurrer and special exception of the defendant should have been sustained.

Conclusion.

This case only further illustrates the unreliability of reasoning based upon a weak and false foundation, constructed under plans and specifications fundamentally erroneous. Should the construction placed upon the Safety Appliance and Employers' Liability Acts by the State Court be allowed to stand approved by this court, the result to the railway carriers of this country is too apparent to call for further comment. The construction placed upon these respective acts by said State courts, rests plaintiff's cause of action and right of recovery not upon any negligence due to defendant, but allows plaintiff to recover even when the injuries complained of arise wholly from plaintiff's negligence alone, and gives him the right to recover damages for his own wrong. This is violative of all principles of both law and equity.

Plaintiff in error respectfully asks that this cause be reversed and remanded or be reversed and rendered, as this honorable court may deem proper under the record herein filed.

R. J. Boyle,
A. B. Storey,
Attorneys for Plaintiff in Error.

Samuel Herrick,
R. S. Day,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1915.

No. 311

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY, Plaintiff in Error,

v.

WILLIAM WAGNER, Defendant in Error.

In Error to Court of Civil Appeals for the Fourth Judicial District of Texas.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

Before answering the assignment of errors, it is well to direct attention of the Court to a portion of plaintiff in error's statement of the case, which might prove misleading. In that statement, appears the following:

"The view of the trial court may be better understood by the following instructions to the jury during the course of the trial:

"Gentlemen of the jury, I wish you would pay particular attention to me at this time, as you will not have this, this

will not be taken with you in the jury room. I want you to remember it carefully. The court having admitted before you certain testimony with reference to adjusting couplers on engines and cars on account of lateral play in order that they might couple automatically by impact, and having admitted before you a certain rule of defendant with reference to prohibiting employees from taking dangerous positions while engaged in their work; and also having admitted before you testimony tending to show that the plaintiff should not have kicked the coupler over in the manner he claims to have done at the time he was hurt, but that he should have had the engine stopped and gotten down and adjusted the coupler, if necessary, to make said coupler couple automatically by impact; and the court being now of the opinion that such testimony is not admissible to prove any issue of this cause, I do now exclude the same from your consideration and direct you in considering your verdict in this case you do not consider any such testimony." (Rec., p. 98.)

By referring to the record, page 98, it will be seen that the quotation is taken from the motion for a rehearing filed by the plaintiff in error in the Court of Civil Appeals. There is nothing, however, in the entire transcript of the record of the Trial Court that even tends to support that statement. A mere allegation in the motion for a rehearing manifestly cannot be considered as proving itself.

In this case, there is no contention that there is no evidence to sustain the verdict of the jury, neither is there any assignment of error filed in this Court which questions the charge of the Court as given to the jury.

PLAINTIFF IN ERROR'S ASSIGNMENT OF ERRORS.

Every question presented by the assignment of errors filed in this Court, arises out of the ruling of the Trial

Court in sustaining a general demurrer to all that part of the plaintiff in error's answer following the general denial.

The portion of plaintiff in error's answer to which the general demurrer was sustained is as follows:

"That the engine and cars of this defendant with which plaintiff was working at the time of his injuries were equipped with automatic couplers, coupling automatically by impact, and which could be uncoupled without the necessity of men going between the ends of cars when the cars were in motion. That all couplers attached to railroad engines, tenders or cars must be provided with sufficient lateral motion to enable engines, cars and trains coupled together to round curves while being moved over railway tracks, and with adjustable knuckles which can be opened and closed, and such couplers must be adjusted at times so that they will couple automatically by impact, and that there is no character or kind of automatic coupler constructed, or that can be constructed, which will couple automatically at all times without previous adjustment, by reason of the lateral play necessary, as aforesaid, to enable coupled cars to round curves, and by reason of such adjustable knuckles necessary to couple and uncouple cars automatically by impact, and said couplers could and should have been adjusted by plaintiff only after bringing said engine and said cars to a standstill and going between the ends of the cars and there was no necessity for plaintiff to go between moving engine and cars or kicking said coupler over with his foot, while said engine was in motion, or endangering his own personal safety in any way; and the Acts of Congress aforesaid do not require that said automatic couplers shall be of such construction that they will couple automatically by impact at all times without any adjustment of the couplers.

"That the engine and cars which the plaintiff was employed upon at the time of his injury were engaged in interstate commerce, and were equipped with automatic

couplers which would couple automatically by impact, as required by said Acts of Congress; but an adjustment was necessary to enable said couplers to couple automatically by impact, and could have been made by the plaintiff going between the cars while they were standing but without going between the ends of the cars, while in motion, or between a moving engine and cars, or without kicking said coupling, or in any manner endangering his own persoanl safety.

"That the work of adjusting said couplers to couple automatically by impact, could have been done by plaintiff or any other person with perfect safety to himself and without any danger or risk of injury by going between the engine and car while standing but that the plaintiff negligently, recklessly and carelessly sought to adjust the couplers on said engine and cars while the engine was moving upon and close to the car to which it was sought to be coupled by kicking the coupler with his foot immediately before the engine and car came in contact, and that he slipped or fell or stumbled while standing on the footboard of the engine with one foot and undertaking to kick the coupler apparatus with the other foot, negligently and recklessly and in utter disregard of his personal safety, and his foot caught between the coupling devices on the engine and car, and his injuries resulted therefrom and not from any negligence on the part of the defendant or any violation of law and its part.

"FURTHER ANSWERING, this defendant says that there was no defect in the coupling apparatus on its engine or care at the time of plaintiff's injury; that the said engine and cars were equipped with automatic couplers, coupling by impact, as required by the Acts of Congress aforesaid, and that while said coupling appartus required adjustment before it would couple automatically by impact at the time of accident complained of, there was no necessity for plaintiff going between the engine and cars while in motion, or in any manner endangering his personal safety to

make such adjustment, and, on the contrary, he was prohibited from so doing by the rules and regulations of this defendant, and that he negligently, recklessly and carelessly in utter disregard of his personal safety and of defendant's rules as aforesaid, stood upon the foot-board of the engine and waited until said engine was about to come in contact with the car to which it was to be coupled, and then sought to kick said coupler into proper adjustment with his foot, and slipped, stumbled or fell while in the act of so doing, and caught his foot between the coupling apparatus of said engine and car, and his injuries resulted from such negligence and contributory negligence on his part, and not through any negligence on the part of this defendant." (Trans., 5-8.)

While this pleading avers that at the time he was injured the defendant in error was engaged in interstate commerce still if the other facts averred failed to show a defense under the Federal law the action of the Trial Court in sustaining a demurrer to the pleading cannot be said to have deprived the plaintiff in error of any right arising under the Federal law. It becomes necessary to ascertain therefore whether the pleading averred facts constituting a defense under the Federal Statute.

The Federal Safety Appliance Act prohibits a carrier by railroad from using any car in intertsate commerce not equipped with couplers coupling automatically by impact without the necessity of the men going between the ends of the cars.

An analysis of the pleading shows that it fails to distinctly and affirmatively allege that the engine and car were equipped with couplers which would couple automatically by impact without the necessity of the men going between the ends of the cars. The effect of the pleading, on the contrary, is to allege that the couplers attached to

the engine and car in question by reason of necessary lateral play had to be adjusted by the men going between the ends of the cars while they were standing so that they would couple automatically by impact. It is true that while the pleading does aver that the couplers would couple automatically by impact without the necessity of men going between the ends of the cars it will not escape notice that all such averments are invariably followed by the qualifying words that the necessity for the men going between the ends of the cars did not exist when the cars **"were in motion."**

Thus, the first averment of the pleading on this subject is in these words:

"That the engine and cars of this defendant with which plaintiff was working at the time of his injuries were equipped with automatic couplers, coupling automatically by impact, and which could be uncoupled without the necessity of men going between the ends of cars **when the cars were in motion."**

Then follows this averment:

"That all couplers attached to railroad engines, tenders or cars must be provided with sufficient lateral motion to enable engines, cars and trains coupled together to round curves while being moved over railroad tracks, and with adjustable knuckles which can be opened and closed, and such couplers must be adjusted at times so that they will couple automatically by impact, and there is no character or kind of automatic coupler constructed or that can be constructed which will couple automatically at all times without previous adjustment, by reason of the lateral play necessary as aforesaid, to enable coupled cars to round curves, and by reason of such adjustable knuckles necessary to couple and uncouple cars automatically by impact, and said couplers could and should have been adjusted by plaintiff

only after bringing said engine and said cars to a standstill and going between the ends of the cars and there was no necessity for plaintiff to go between moving engine and cars or kicking said coupler over with his foot, while said engine was in motion."

Then follows this averment:

"That the engine and cars which the plaintiff was employed upon at the time of his injury were engaged in interstate commerce and were equipped with automatic couplers which would couple automatically by impact, as required by said Act of Congress; but adjustment was necessary to enable said couplers to couple automatically by impact and could have been made by plaintiff going between the engine and car while they were standing but without going between the ends of the cars while in motion or between a moving engine and cars," etc.

It is then averred:

"That the work of adjusting said couplers to couple automatically by impact could have been done by plaintiff or any other person with perfect safety to himself and without any danger or risk of injury by going between the engine and car while standing, but that the plaintiff negligently, recklessly and carelessly sought to adjust the couplers on said engine and cars while the engine was moving," etc.

It is further averred:

"That there was no defect in the coupling apparatus on its engine or cars at the time of plaintiff's injury; that the said engine and cars were equipped with automatic couplers coupling by impact, as required by the Act of Congress, and that while said coupling apparatus required adjustment before it would couple automatically by impact at the time of the accident complained of, there was no necessity for plaintiff geing between the engine and car while in motion."

The foregoing quotations show that instead of averring that the couplers would couple automatically by impact without the necessity of the men ever going between the ends of the cars, the pleading shows that it was necessary for the men to go between the ends of the cars to properly adjust the couplers so that they would couple automatically by impact. It is true that the pleading does aver that there was no necessity for the men to go between the ends of the cars when in motion, but there is the distinct and clear averment that the defendant in error should have stopped the car and gone bteween the engine and car while they were standing and adjusted the couplers.

The pleading presents the issue that the couplers furnished by plaintiff in error complied with the law nothwithstanding the necessity for the men going between the ends of the cars to adjust them in position to couple automatically by impact. But the plain letter of the law requires that the couplers shall be such that they will couple automatically by impact "without the necessity of the men going between the ends of the cars."

The statute makes no exception. It plainly requires that the cars shall be equipped with couplers coupling automatically by impact so as to avoid the necessity of men going between the ends of the cars.

It cannot be said that the statute has been complied with when the couplers with which the car and engine were equipped were such that they would not couple automatically by impact unless the men went between the ends of the cars when standing and adjusted the couplers.

To sustain this contention would be but to abrogate the paramount purpose of the statute, whereby the necessity

for the men to ever go between the ends of the cars in coupling them was to be obviated.

The obvious theory upon which the pleading was framed is that because the necessary adjustment of the couplers should be made by the men going between the ends of the cars while the cars were standing and not while the cars were in motion that this was a compliance with the statute. It proceeds upon the theory that the adjustment if made when the cars were standing could be made in perfect safety to the men, and therefore the statute was complied with.

There never was a more fallacious contention.

A man might be ever so careful himself in going between the ends of standing cars and yet be the victim of some other man's negligence in moving or causing the cars to be moved and thus injure or kill him.

There is no absolute safety to the men engaged in couping cars if under any circumstances they were required to go between the ends of the cars, for being between the ends of cars is always a source of danger.

And it was to make the coupling of cars as safe as possible for the men doing that work that this law was passed.

The railroads of the country would not otherwise safeguard the lives and limbs of their employes engaged in coupling cars. Year after year an increasingly heavy toll of human life and limb was paid on account of the danger attendant upon the work of coupling cars, until Congress, in response to a widespread public sentiment, in 1893 enacted the first safety appliance act.

This act has been followed by a similar statute in Texas and supplemented by statutes familiarly called Employers' Liability Acts, so that under those statutes there no longer exists any defense to an action brought by a railroad em-

ployе injured while coupling cars if the injury is caused by reason of the railroad's failure to equip its cars with couplers coupling automatically by impact without the necessity for the men going between the ends of the cars. These laws, expressly abolish the defenses of contributory negligence and assumed risk in all cases where a railroad employe is injured by reason of the failure of the railroad to comply with requirements of the safety appliance act.

Defendant in error, however, cites a number of cases, both Federal and State, where the defense of contributory negligence was permitted in cases where an employe had been injured because of a violation of the safety appliance act.

An examination of these cases, however, will diclose either that they arose prior to the enactment of the Federal statute in 1908, or else that other acts of negligence were relied on by the plaintiff besides the violation of the safety appliance act.

Prior to 1908 the Federal Employers' Liability Act did not exclude the defense of contributory negligence, but the Act passed in that year, as shown by its very terms, expressly excludes that defense when the injuries of the employe are sustained because the safety appliance act is violated. It will consume too much space and time to review each of the cases thus cited by plaintiff in error, but we have examined every one of them and the examination discloses that in each instance either the injury occurred prior to the Act of 1908, or else that other acts of negligence were relied on by the defendant in error besides the violation of the safety appliance act.

Yet, nothwithstanding this defense of contributory negligence has been abolished, plaintiff in error by the pleading

under consideration, undertook to cast the blame upon defendant in error for his injuries because it is averred that he was negligent in attempting to adjust the couplers when the engine was in motion instead of adjusting them when the engine was standing.

But this may not be done under the statute. If the couplers attached to the engine and car would not couple automatically by impact, as required by law, and this caused defendant in error's injury, then there was no defense to this action. If they did, then defendant in error had no case.

Whether or not the couplers met the requirements of the law was a pure question of fact for the jury.

In the pleading under consideration plaintiff in error stresses the fact that no coupler can be made that will always couple automatically by impact without being adjusted. Upon this alleged necessity for adjusting the couplers plaintiff in error predicates its contention that the men should go between the ends of the cars when the cars are standing and not while in motion, and adjust the couplers.

But plaintiff in error did not aver that couplers could not have been placed on the engine and car which could have been adjusted by some appliance on the outside so as to obviate the necessity of the men going between the ends of the cars.

Plaintiff in error does not aver a state of fact which shows that it was physically impossible to comply with the letter of the law.

The simple fact that because of necessary lateral motion couplers do require to be adjusted, so that they will couple automatically by impact, is not of itself sufficient to justify

equipping cars with such couplers which necessitates the men going between the ends of the cars even when the cars are standing to do the adjusting.

If, in addition to averring that the lateral motion in the couplers made it necessary to adjust the couplers, plaintiff in error had also averred that it was impossible to equip its cars with any device whereby the couplers could be adjusted from the oustide so they would couple automatically by impact; and that in order to adjust the couplers to couple automatically by impact it was essential that the men go between the ends of the cars for that purpose, a very different question from that involved here would have been presented.

The question would then have been presented whether, since it was physically impossible to comply with the literal words of the law, literal compliance therewith was intended.

Such an issue would raise questions both novel and interesting.

But no such issue is raised by this pleading of plaintiff in error.

While it is averred that no coupler can be made that will couple automatically by impact at all times, because all such couplers, on account of the necessary lateral motion, require adjustment in order to couple automatically by impact, it is nowhere averred that it is impossible to provide couplers in which the necessary adjustment can be made from the outside without the necessity of the men going between the ends of the cars to do the adjusting.

In the absence of a distinct averment of the impossibility of equipping cars with couplers which will couple automatically by impact without the necessity of the men going

between the ends of the cars to adjust the couplers, the courts will presume that the law can be complied with.

Defendant in error submits with much confidence that the pleading under consideration fails to state any facts that constitute a defense to the cause of action alleged in his petition.

The pleading is a plain attempt to engraft an exception upon the law. It seeks to excuse having the character of couplers that were upon this engine and car, by averring that the lateral motion in them was such that it became necessary for the men to go between the ends of the cars while the cars were standing and adjust the couplers so that they would couple automatically by impact.

If plaintiff in error may lawfully do this, why may it not lawfully equip its cars with such couplers as that it would be necessary for the men to go between the ends of the cars when they were in motion for the purpose of adjusting the couplers so they would couple automatically by impact?

And if it may lawfully do these things, why may it not lawfully equip its cars with couplers which will only couple automatically by impact part of the time and not all of the time?

In short, if plaintiff in error may lawfully engraft one exception upon the plain letter of the statute, it follows that it may lawfully engraft as many exceptions to the statute as suits its fancy, with the consequent result that the entire statute would be emasculated. These suggestions make it manifest, if, indeed, it is not self-evident, that the facts alleged in that portion of plaintiff in error's answer which was stricken out wholly fail to constitute any defense to defendant in error's cause of action.

Authorities are not wanting to sustain the action of the Court now under review.

The National Safety Appliance Act has been before this Court in several cases, and it has been upheld in its letter and spirit "without variableness or shadow of turning." (Johnson v. S. P. Co., 96 No. 5. 1. Ry. v. Taylor, 210 U. S., 281. Ry. v. U. S., 220 U. S., 559. Delk v. Ry., 220 U. S., 580. Ry. Co. v. Lindsey, 233 U. S., 42. Ry. v. Padgett, 236 U. S., 668. Ry. Co. v. Popplar, 237 U. S., 369.) (See also Ry. v. McCarney, 155 S. W., 93. Morris v. Ry. Co., 158 S. W., 93.)

We have discussed the questions raised by plaintiff in error's assignment on the assumption that the special answer raised the issue of the necessity for the men to go between the ends of the cars when standing, in order to adjust the couplers. The lower court so construed the answer and held that couplers of that character did not satisfy the requirements of the statute and that holding was approved by the Court of Civil Appeals. We think it is clear that that is the plain meaning of the answer.

If it could be said that the answer did not mean what the lower court held it meant; and that the pleading merely presented the issue that the engine and car were equipped with couplers coupling automatically by impact without the necessity of the men going between the ends of the cars, the question would then arise whether plaintiff in error was injured by the ruling of the court below. If it was not, then, of course, no harm has been done by the ruling complained of.

Defendant in error's petition averred that the couplers would not couple automatically by impact, as required by law, and that by reason thereof he was compelled to go be-

tween the engine and car and shove the coupler in position and was thereby injured.

In answer to this petition plaintiff in error pleaded a general denial.

The effect of this general denial was to put in issue the fact of whether the couplers did comply with the law and whether the condition of the couplers caused defendant in error's injuries.

Under this general denial plaintiff in error was at liberty to offer any testimony it saw fit which would tend to prove that the couplers on the engine and car would couple automatically by impact without the necessity of the men going between the ends of the car. But it offered no such testimony.

It did offer testimony tending to show that there was no defect in the couplers from its standpoint; but the record will be searched in vain for any proferred testimony tending to show that the couplers would couple automatically by impact without the necessity of the men going between the ends of the cars.

If plaintiff in error had any such testimony at hand there was no obstacle to its introduction.

If it had such testimony at hand and failed to offer it, how can it claim it has been injured by the ruling of the court in striking out its answer?

The answer would only have set up a defense when held to mean that it presented the issue that the couplers would couple automatically by impact without the necessity of the men going between the ends of the cars.

But the general denial, as we have seen, put these same facts in issue. Under its general denial, plaintiff in error could have offered testimony tending to show that the

couplers on the cars would couple automatically by impact without the necessity of the men going between the ends of the cars; and if the jury had credited the testimony that would have been an end of defendant in error's case.

But, as we have seen, plaintiff in error offered no such testimony.

It necessarily follows from what has been said that inasmuch as plaintiff in error under its general denial might have offered all the testimony it could have offered under the special answer, and that it did not do this, it fails to show that the ruling of the court caused it any harm.

Nor is the position bettered by the fact that the special answer undertook to set up the defense of contributory negligence.

For the defense of contributory negligence was not available in this action if the couplers did not comply with the law.

If the couplers did comply with the law, defendant in error had no case.

If they did not comply with the law, contributory negligence was not a defense.

Therefore, the only possible legitimate issue that could arise in this case was whether the couplers did comply with the law.

We think it very clear from what has been said that if the lower court erred in construing the answer, the error was purely abstract and did not and could not possibly have injured plaintiff in error, since, under the issue raised by the general denial, plaintiff in error might have offered all the testimony it could lawfully have offered under its special answer.

The Court of Civil Appeals in this case, has held in accordance with this suggestion.

PLAINTIFF IN ERROR'S ADDITIONAL ASSIGNMENT OF ERRORS.

The plaintiff in error presents three additional assignments of error. It ought to be sufficient to dispose of these assignments, to call attention to the fact that not one of them was insisted upon in the Supreme Court of Texas. (Trans., pp. 111-134.) As we understand it, in order to have the action of the highest Court in the State reviewed, it is necessary that the questions should have been presented to that court. However, be that as it may, it is obvious that there is no merit in either of the additional assignments.

The first assignment of error complains of the trial court's charge upon the ground as asserted, that the defendant in error's petition was predicated upon the theory that the plaintiff in error was negligent in respect to the coupling apparatus between the engine and car. It is true that the petition claims that the failure to have the couplers so that they would couple automatically by impact as required by law, was negligence. We understand the law to be that a failure to discharge a positive duty created by statute, always constitutes negligence. Negligence can never be predicated except upon a failure to discharge a duty and inasmuch as the statutes, both National and State, enjoined the duty upon the plaintiff in error to have couplers which would couple automatically by impact without the necessity of the men going between the ends of the cars, a failure to discharge that duty constituted negligence as a matter of law. The Court submitted to the jury to find the facts, whether the couplers would couple automatically by impact, without the necessity of the men going between

the ends of the cars. The jury found that the couplers did not so couple and there is no complaint that that finding is not justified by the facts.

By the second additional assignment of error, it is contended that the Court erred in refusing to give a special charge to the effect that if the coupling apparatus on the engine and tender was out of adjustment, so it would not couple automatically by impact by reason of any act of the plaintiff, to return a verdict for the defendant. It is a sufficient answer to this contention to say that there is no evidence to sustain it. There is no evidence whatever, tending to show that any act of plaintiff put the couplers out of alignment or out of adjustment. Besides the charge is predicated upon the theory that the defendant was entitled to a verdict notwithstanding the couplers would not couple automatically by impact.

Third additional assignment of error. The same contention is made here as was made under the second assignment of error. There is no evidence in the record justifying a finding that the defendant in error committed any act whereby the couplers were put out of alignment or adjustment. Besides, as stated in answer to the preceding assignment, this charge was predicated upon the theory that a recovery could have properly been denied defendant in error, even though the couplers would not couple automatically by impact as required by law.

There is no error in the record and the judgment should be affirmed.

PERRY J. LEWIS,
H. C. CARTER,
JOHN SEHORN,
Attorneys for Defendant in Error.